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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

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Civil RICO (Racketeer Influenced and Corrupt Organizations Act) Applications in the Highway Construction Industry

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the Agency conducting the research. The report was prepared by Kathleen F. Brickey. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper which continues NCHRP's policy of keeping departments up to date on laws that will affect their operations.

While it may seem unusual for NCHRP to do a research project on what is primarily criminal law, the reader will learn it is relevant to highway operations because it can be used to prosecute bid rigging contract performance, and billing

abuses under a highway construction contract. Further, while it is primarily a criminal statute, it does have a civil cause of action that authorizes recovery of treble damages, the cost of suit, and reasonable attorney fees.

This paper will be published in a future addendum to SSHL. Volumes 1 and 2 of SSHL, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976. Volume 3, dealing with contracts, torts, environmental and other areas of highway law was published and distributed early in 1978. An expandable publication format was used to permit future supplementation and the addition

of new papers. The first addendum to SSHL, consisting of 5 new papers and supplements to 8 existing papers, was issued in 1979; and a second addendum, including 2 new papers and supplements to 15 existing papers, was released at the beginning of 1981. In December 1982, a third addendum, consisting of 8 new papers, 7 supplements, as well as an expandable binder for Volume 4, was issued. In June 1988, NCHRP published 14 new papers and 8 supplements and an index that incorporates all the new papers and 8 supplements that have been published since the original publication in 1976, except two new papers that will be published when Volume 5 is issued in a year or so. The text now totals some 4,400 pages, comprising, in addition to

the original chapters, 79 papers, of which 38 are published as supplements and 29 are new papers in SSHL; additionally, 7 supplements and 5 new papers appear in the Legal Research Digest series and will be published in the SSHL in the near future. Copies of SSHL have been sent, free of charge, to NCHRP sponsors, other offices of State and Federal governments, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the volumes are for sale through the publications office of TRB at a cost of \$145.00 per set.

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Civil RICO Applications in the Highway Construction Industry

By Kathleen F. Brickey

George Alexander Madill Professor of Law
Washington University
St. Louis, Missouri

INTRODUCTION

As its title suggests, RICO—the Racketeer Influenced and Corrupt Organizations Act—was enacted primarily to combat organized crime.¹ But to provide federal prosecutors wide latitude in using this new law enforcement tool, Congress did not make organized crime the exclusive target of RICO. Instead, Congress fashioned expansive liability provisions that make RICO applicable to numerous categories of white collar crime as well. Because RICO prosecutions may be premised on white collar offenses, such as bribery, conspiracy, and mail and wire fraud, the statute can clearly be used to address abuses in the bidding, performance, and billing of highway construction contracts.

Although RICO is primarily a criminal statute, Congress saw fit to provide a private civil cause of action to anyone who has been injured in his business or property by virtue of a RICO violation. The creation of civil RICO liability has revolutionized the law governing business disputes. In addition to providing a federal forum for commercial litigants (including governmental entities), the civil RICO statute authorizes recovery of treble damages and the costs of suit, including reasonable attorneys' fees. As if those were not sufficient inducements to add a RICO count to a civil complaint, plaintiffs lawyers justifiably believe that a RICO count provides a powerful incentive for reputable business defendants to settle to avoid being publicly labeled racketeers. Hence, a virtual explosion of civil RICO litigation.

Like other segments of the business community, the highway construction industry is affected by the increased use of criminal and civil RICO. Between October 1, 1987, and March 1, 1988, for example, 19 individuals and 2 corporations were indicted for racketeering, conspiracy, and fraud in a Federal Highway Administration funded project as a result of a federal grand jury investigation conducted jointly with the FBI and a state inspector general's office. During the same period, a federal criminal investigation and conviction of a highway inspection company, its principals, and a state employee led to a civil RICO suit against them to recover damages allegedly suffered by reason of their extortion of federal-aid funds from the state.

WHAT CIVIL RICO IS ALL ABOUT

The civil RICO provision, 18 U.S.C. § 1964(c), is short and to the point. It provides that anyone who is "injured in his business or property by reason of a violation of section 1962 . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."²

Apart from spelling out the requirement of injury to business or property, § 1964(c) does not identify the elements of the cause of action. It requires, instead, that the injury must be caused by a violation of § 1962, the criminal RICO provision. Thus, to prove a civil RICO claim, the plaintiff must also establish a criminal RICO violation.

Section 1962 defines four discrete types of RICO violations, each of which is concerned with the relationship between a "person" who is engaged in a "pattern of racketeering activity" and an "enterprise" that affects interstate or foreign commerce. Section 1962(c), for example, forbids a "person" who is *employed by or associated with* an "enterprise" from *participating in the conduct of the affairs of the "enterprise" through a pattern of racketeering activity.*

Key Concepts

The Person and Enterprise Requirements

Section 1962 requires that the wrongdoer must be a "person." For purposes of RICO liability, a "person" can only be an individual or entity capable of holding a legal or beneficial interest in property. Thus, only human beings and juristic persons are capable of violating the statute.

Although there is obvious overlap between the two requirements, "enterprise" is a more fluid concept. An enterprise may be an individual or a legal entity (i.e., a *de jure* enterprise). Thus, a corporation, partnership, or association could fill the role of the RICO enterprise, even though it is a wholly legitimate business.

But the term "enterprise" also encompasses "any union or group of individuals associated in fact although not a legal entity" (i.e., a *de facto* enterprise). This prong of the definition has been broadly construed to include such public entities as the Illinois Department of Transportation,³ the Office of the Tennessee Governor,⁴ the Pennsylvania State Senate,⁵ a state senator's office,⁶ and a Division of the Construction and Building Department of Baltimore Housing and Community Development.⁷ An association of corporations or of businesses operated under various forms of organization also may be a RICO enterprise.⁸

Although the enterprise must be engaged in interstate or foreign commerce or its activities must affect commerce, only a minimal connection need be shown.

As was noted earlier, the "person" and "enterprise" elements overlap. A corporation, partnership, or association could fill the role of either the person or the enterprise. But a "group of individuals associated in fact," that is, not a legal entity, qualifies only as an enterprise because the association is incapable of holding an interest in property.⁹ Individual members of the association are, of course, RICO persons.¹⁰

Illustration 1: Corporation A, a cement supplier, and B, a government contracting official, conspire to rig bids on a highway contract. A and B are both "persons" because they are capable of holding a legal or beneficial interest in property. A and B may also either individually or collectively constitute an enterprise: individually, because A is a

legal entity, and B is an individual; collectively, because A and B are associated in fact and the association is not a legal entity. But A and B as a collective entity cannot be a person because they cannot, as an association, hold a legal or beneficial interest in property.

As will be seen later,¹¹ the distinction between the person and enterprise elements can be crucial.

Pattern of Racketeering Activity

RICO liability is premised on finding a pattern of racketeering activity.¹² The racketeering activity requirement is, in reality, a requirement that the defendant must have engaged in conduct that is criminal quite independently of RICO's prohibitions. Thus, RICO violations are compound offenses. RICO requires proof of the commission of at least two predicate crimes (i.e., racketeering activity) plus the conduct that RICO prohibits itself. Racketeering activity may consist of either federal or state crimes.

Federal Predicate Crimes.—Among the many federal crimes that may serve as RICO predicate offenses, bribery of public officials¹³ and mail and wire fraud¹⁴ are the most likely crimes to be named as racketeering activity in a suit alleging highway contracting abuses. Hence, these offenses are considered briefly as follows:

1. *Bribery.* The federal bribery statute prohibits the corruption of federal public officials¹⁵ by offering or giving something of value to influence an official's decision or action (the crime of bribery) or on account of an official decision or action already taken (the crime of gratuity).¹⁶ The principal distinction between bribery and gratuity is that the crime of bribery requires that the bribe giver or receiver must act "corruptly." That is, the bribe must constitute a quid pro quo for a specified decision or action. The bribe giver must have intended to influence the public official's judgment or action or the public official must have solicited or accepted the bribe in exchange for being influenced by the payment.

Gratuity, in contrast, merely requires that the party offering or making the payment must have done so "for or because of any official act performed or to be performed" by the public official. Alternatively, gratuity could be established by proving that the public official's solicitation or acceptance of the payment was related to official action taken or to be taken by him. Thus, gifts given to "create a better working atmosphere" or in "appreciation" for favorable action are illegal gratuities and are prohibited.¹⁷

Illustration 2: A, a transportation official, receives a Christmas gift from B, a friend who is pleased with A's decision to allocate highway construction funds to a project in B's state. Without additional facts that link the gift to the decision, this is a social gift and not a gratuity. But if B attaches a note to the gift saying that the gift is in appreciation for A's help in approving the badly needed construction project, the gift is related to the official action and constitutes the crime of gratuity.

The bribery and gratuity provisions extend both to public officials who presently serve and to those who have been selected to serve as well.

Thus, congressmen, federal employees, nominees and those who have been notified of their nomination are within the ambit of the statute's protection. The statute also extends to "any person acting for or on behalf of" a federal department or agency in an official function.¹⁸ That has led to a broad reading of the statute to include private inspectors charged with assuring quality control on behalf of a governmental agency¹⁹ and a corporation and an employee authorized by a governmental agency to conduct bidding for repairs of agency property.²⁰

The seemingly limitless reach of the bribery statute to private sector employees led the Supreme Court to consider the breadth of the term "public official" in *Dixon v. United States*.²¹ In *Dixon*, two executives of a nonprofit corporation that was a subgrantee of federal block grants were accused of soliciting bribes from contractors who worked on funded projects. Although the executives had no formal bond with the federal government, their salaries were paid with grant money, and their responsibilities included selecting grant recipients and disbursing federal funds.

A sharply divided Court rejected the argument that the executives were not acting for or on behalf of the government in an official function for purposes of the bribery statute. Rather than looking to a formalized relationship with a government agency, the Court concluded, the relevant statutory inquiry is whether the executives occupied "a position of public trust with official federal responsibilities."²² In assuming and discharging operational responsibilities for the grant program, they "assumed the quintessential official role of administering a . . . program established by the United States Congress."²³

2. *Mail and Wire Fraud.* The mail fraud statute is one of the most widely used federal criminal statutes. Although the statute contains three separate clauses that define ways in which mail fraud may be committed, the heart of the statute is its prohibition of the use of the mails for the purpose of executing any scheme or artifice to defraud.²⁴ The statute does not define the term "defraud," and courts historically have viewed this open-textured term to reach all conduct that is inconsistent with "moral uprightness [and] fundamental honesty, fair play and right dealing in the general business life of members of society."²⁵

Until 1988, a mature body of mail fraud jurisprudence held that the fraud need not relate to money or property. A scheme to defraud could have as its object the deprivation of intangible rights, such as the right of an employer to the honest and loyal services of his employee (e.g., an employee solicits kickbacks from a supplier, or a competitor bribes the employee to act contrary to the employer's best interests)²⁶ and the right of the citizenry to the loyal and faithful services of its public officials and employees (e.g., B bribes A to approve the construction project).²⁷

But in 1988 the Supreme Court abruptly overturned what had been the rule in every circuit that had considered the issue. In *McNally v. United States*,²⁸ the Court held that a scheme to defraud another of intangible rights is not a scheme to defraud under the mail fraud statute. Instead, according to the Court, the statute requires the object of the scheme to be deprivation of money or property.

Because *McNally* represented such an abrupt departure from familiar ground, in the minds of some it raised issues that most knowledgeable people had assumed were well settled. Principal among them was the question whether a scheme to deprive another of intangible property, as opposed to intangible rights, could be reached under the mail fraud statute. If A's competitor bribed A's employee to disclose confidential business information, for example, would that be a scheme to defraud A? It would have been before *McNally*,²⁹ but afterward it was not entirely clear.

The doubt on this point was short-lived, for early in its next term the Court decided *Carpenter v. United States*,³⁰ the Wall Street Journal insider trading case. Carpenter, who wrote a financial column for the Wall Street Journal, was convicted of insider trading and mail fraud in connection with a scheme to disclose the contents of his column prior to its publication, for the purpose of trading or allowing others to trade on it. *Carpenter* had been closely watched more for its potential to define the contours of insider trading law than as an important mail fraud precedent. But an evenly divided Supreme Court summarily affirmed the insider trading conviction, thus giving this highly celebrated case utterly no precedential value as an insider trading case. What proved to be significant was the Court's affirmation of the mail fraud conviction on the ground that confidential business information is property (albeit intangible) and that *McNally* had held that *property* (as opposed to rights) is protected by the mail fraud statute.³¹ Thus, the conviction could stand.

Not long after that, Congress stepped in and quietly reinstated the intangible rights theory by providing that for purposes of certain fraud statutes, including the mail fraud statute, a scheme to defraud includes a scheme to deprive another of the right to honest services.³² Thus, disloyal employee and public corruption cases are now expressly within the ambit of the mail fraud statute.³³

To bring a scheme to defraud within the statute's reach, the defendant must use or cause the use of the mails in furtherance of the scheme. That does not mean, however, that the use of the mails must be central to the scheme. Instead, it is sufficient that the mailing is "incident to an essential part of [the] scheme."³⁴ Thus, the mailings may precede or follow the fraudulent conduct,³⁵ provided that they do not occur before the scheme's inception and that the scheme has not come to an end.³⁶ But determining whether the mailings have the requisite connection to the scheme to defraud is at best an inexact science.

Illustration 3a: B, a subcontractor that supplies cement, mails a padded bill to A, the prime contractor. A mails B a check for the inflated amount. Upon receipt of the check, B deposits it in the bank. The bank uses the mails to collect the check.

B has engaged in a scheme to defraud A in the amount by which the bill is inflated. B used the mails to execute the scheme by mailing of the bill to A. B also caused A and the bank to use the mails in furtherance of the scheme (i.e., to collect the overstated amount). Because billing the inflated amount, receiving the check, and collecting the proceeds of the check are all related to the essence of the scheme, each of the three mailings will support a separate mail fraud count against B.

Illustration 3b: After the events in Illustration 3a occur, B withdraws the amount of A's check from its account and the bank mails B a statement reflecting that transaction. In the meantime, A reviews B's bill and becomes suspicious that the amount may be overstated. A writes B and asks for an opportunity to review B's receipts and records to be sure that the bill is correct. B writes back that a CPA has already audited the account and determined that it was accurate.

The mailing of the bank statement occurs after B has received the proceeds of the check. It is not incidental to an essential part of the scheme and thus does not support a mail fraud count. Although the communication from B to A also occurs after B has achieved the object of the scheme, the purpose of the letter is to lull A into a false sense of security, thus preventing or delaying the detection of the fraud. Thus, the lulling letter is incident to an essential part of the scheme (i.e., getting away with the fraud) and constitutes use of the mails in furtherance of the fraud.

In addition to providing examples of how mailings may be related to the fraudulent scheme, Illustrations 3a and 3b also bring to bear two additional important points. First, the content of the mailings need not be fraudulent, immoral, or unlawful. In Illustration 3a, the check mailed by A and then by the bank was not fraudulent. A was merely tricked into making it payable for an inflated amount. Second, the party who uses the mails in furtherance of the scheme need not be a party to the fraud. A was the victim of the fraud, yet A's mailing of the check was essential to the fruition of the scheme. The bank was neither a victim nor a perpetrator of the fraud, yet its mailing of the check was also essential to B's obtaining the padded amount.

Suppose that in Illustration 3b, B followed up the letter with a telephone call to assure A that an audit had been performed and that the bill was correct. In that event, it would be necessary to explore whether the communication was interstate or intrastate. If interstate, it would run afoul of the wire fraud statute, which prohibits using wire, radio, or television transmissions in interstate or foreign commerce for the purpose of executing a scheme to defraud.³⁷ As was true of B's letter in Illustration 3b, the telephone call would be incidental to an essential part of the scheme because it was made for the purpose of lulling A into believing that everything had been checked out. Thus, the determinative issue is whether the call was in interstate commerce. Although a wholly intrastate transmission would be insufficient,³⁸ an intrastate call that, unbeknownst to the caller, is routed outside the state is sufficient.³⁹

State Predicate Crimes.—In contrast with the specificity with which federal predicate crimes are enumerated as racketeering activity, state predicate crimes are designated as "any act or threat involving" one of eight categories of offenses that is "chargeable under State Law and punishable by imprisonment for more than one year."⁴⁰ Thus, three elements must be present for a state crime to serve as a RICO predicate offense: (1) it must involve a specified category of crime; (2) it must be chargeable under state law; and (3) it must be punishable for more than one year in prison.

For present purposes, bribery is the most notable state predicate crime. Because the definition of bribery will vary from state to state, so, too, will the substantive content of the RICO predicate crime depend on where the conduct occurs.

Bribery has historically been defined as the "corrupt" payment or receipt of something of value in exchange for official action. Because it made the corrupt nature of the payment the touchstone of liability, this definition contemplated that benefits conferred upon a public official could be either corrupt or noncorrupt. The definition did not, however, specify what would make an agreed upon exchange corrupt.

Faulting that approach for failing to provide meaningful guidance,⁴¹ the Model Penal Code attacks the problem head on and specifically identifies the prohibited official favor—e.g., a public servant's official decision, opinion, recommendation, vote, or other exercise of discretion,⁴² thus obviating the need to inquire whether the bribe giver or taker acted "corruptly." Although the majority of recently revised state bribery statutes follow the lead of the Model Penal Code,⁴³ many unrevised⁴⁴ and a few newly revised statutes⁴⁵ still focus on the actor's corrupt purpose rather than on specifically forbidden exchanges.⁴⁶

So, too, may states choose to label their bribery offenses differently. But what the offense is called is unimportant for purposes of designating it as a RICO predicate crime, for the reference to bribery as a state predicate offense is merely a generic designation.⁴⁷ The key criterion is not how a particular state classifies the offense but is, instead, "whether the particular state . . . prohibits the . . . activity charged."⁴⁸ Thus, the conduct must *involve* what is commonly recognized as bribery and must be *chargeable* under state law—i.e., it must be a state crime. If those two elements are present and the offense is punishable by imprisonment for more than one year, the conduct may be designated as a RICO predicate offense.

Illustration 4a: A, a highway contractor makes systematic payments to B, a state highway agency official, to obtain favorable treatment. The state's bribery statute authorizes a 5-year prison sentence for accepting bribes, but only authorizes a sentence not to exceed 1 year for giving bribes. In a civil RICO suit naming A as defendant, A's bribe-giving to B in violation of the state statute does not qualify as racketeering activity because the authorized penalty is insufficient. In a civil RICO suit naming B as defendant, on the other hand, B's bribe-receiving in violation of the state statute qualifies as racketeering activity.

Illustration 4b: Assume that in Illustration 4a a second state statute defines the crime of "corrupt solicitation," an offense that may be committed offering money to public officials with intent to influence them in their performance of their official duties. Corrupt solicitation is punishable by imprisonment for up to 2 years. In a civil RICO suit naming A as defendant, A's bribe-giving to B in violation of the corrupt solicitation statute qualifies as an offense involving bribery that is punishable for more than one year and thus constitutes a predicate crime.⁴⁹

Although it may not be immediately apparent, the requirement that conduct must be "chargeable" and "punishable" under state law has little to do with whether the actor himself is amenable to state criminal prosecution. It is the *conduct*, not the actor who engages in the conduct, that must be chargeable and punishable when the conduct occurs.⁵⁰ Thus, even if a civil RICO defendant cannot be tried and punished under state law because he has previously been acquitted or because the state statute

of limitations has run, the conduct itself may still be designated as racketeering activity in a civil RICO suit.⁵¹

Similarly, if state law prohibits multiple prosecutions or punishments for two particular offenses, that serves as no barrier to naming those offenses as RICO predicates because the state bar is procedural only. The conduct nonetheless may have violated the statutes in question.⁵²

Illustration 4c: A and B, highway construction companies, conspire to bribe C, a state official, to obtain favorable treatment. Bribery and conspiracy are both punishable by more than 1 year in prison. A state statute prohibits convicting any person of bribery and conspiring to commit the same bribery. Because A and B's conduct violates both the conspiracy statute and the bribery statute, both offenses may be designated RICO predicates.

Thus far our consideration of bribery as a predicate crime has assumed that a public official would be involved in the bribery. But what if Company A bribes Company B and Company C to induce them to submit complementary bids? Commercial bribery is not a federal crime.⁵³ But because commercial bribery is a crime under the laws of some states,⁵⁴ it may serve as a RICO predicate crime "involving bribery" if it satisfies the "chargeable" and "punishable" requirements.

As a final note, although bribery is the principal state predicate crime, RICO designates *any act involving* bribery as racketeering activity. Hence, in Illustration 4c above, the conspiracy to bribe could also serve as a state predicate crime.

Imputing Predicate Crimes to Business Organizations.—The principles under which crimes may be attributed to corporations and other business organizations may vary, depending on whether federal or state predicate crimes are alleged.

Federal criminal liability for entities is premised upon a broad respondeat superior rule. Under federal law, a corporation is liable for criminal acts committed by an agent who is acting within the scope of his employment and on behalf of the entity.⁵⁵ This rule obtains regardless of the agent's status within the corporate hierarchy. As long as the agent commits the crime in connection with the performance of some job-related activity, the corporation is liable, whether the agent is a subordinate employee or an officer of the company. Thus, whenever an organization is charged with engaging in a pattern of federal predicate crimes, there are few impediments to attributing the acts and intent of its agents to the entity.

The state law rules governing attribution of criminal conduct to corporations vary widely from jurisdiction to jurisdiction. Some states endeavor to follow a more restrictive rule like that in the Model Penal Code, which limits corporate liability for true crimes to instances in which the board of directors or a high managerial agent authorized, commanded, or recklessly tolerated the wrongful conduct,⁵⁶ while others follow the broader respondeat superior rule.⁵⁷

Whether the amenability of a corporation to prosecution for a state predicate crime controls the determination that the crime is "chargeable" under state law is not entirely free from doubt. On the one hand, in

noncorporate settings courts emphasize that the reference to state law is definitional only.⁵⁸ It is the *conduct*, not the particular defendant, that must be chargeable under state law.⁵⁹ Thus, a procedural bar to prosecuting the defendant under state law would not prevent the conduct from being characterized as a violation of state law.

But while RICO does not incorporate state procedural defenses, it does incorporate state substantive defenses.⁶⁰ The RICO indictment must allege, and the government must prove, that all of the elements of the predicate offense were present. If the indictment fails to allege, or the government fails to prove, that the requisite corporate agent did not authorize, command, or commit the wrongful acts, the corporation has a substantive, not a procedural, defense. Thus, it could be argued that if under state law a corporation could not be charged absent managerial complicity, then, as to the corporation, the state predicate crime was never chargeable unless that element was present.

The Pattern Requirement.—The presence of multiple predicate crimes is, standing alone, insufficient. They must, instead, form a pattern of racketeering activity. The “pattern” requirement remains among the most troublesome of the elements of a RICO violation, in large measure because Congress provided an open-textual definition of the term. A “pattern” of racketeering activity requires at least two acts of racketeering (i.e., two or more predicate crimes) that have been committed within 10 years of one another. This skeletal definition states the minimum requirements for finding a pattern. It informs us what a pattern *requires*, but not what pattern *is*—hence, a continuing endeavor to infuse substantive content into the pattern concept.

The Supreme Court supplied its first hint of what a pattern should be in what was to become the infamous footnote 14 *Sedima, S.P.R.L. v. Imrex*.⁶¹ In *Sedima*, the Court said that the predicate acts comprising the pattern of racketeering activity could not be isolated. They must, instead, bear a relationship that evidences continuity. And while the statutory definition requires at least two acts, “in common parlance two of anything do not generally form a pattern.”⁶²

Footnote 14 has since been cited in support of every imaginable proposition. Most bizarre among them was the Eighth Circuit’s view that a single continuing fraudulent scheme could not constitute a pattern of racketeering activity without proof of similar wrongdoing in the past or of other criminal activity elsewhere.⁶³ In essence, the Eighth Circuit view required proof of multiple criminal schemes in most cases. The Eighth Circuit holding spawned such disagreement among the circuits that it became impossible to summarize the state of the law. That development, of course, invited Supreme Court scrutiny.

The Court accepted the challenge of unravelling the puzzle in *H.J. Inc. v. Northwestern Bell Telephone Company*,⁶⁴ an Eighth Circuit case that had been dismissed because only one criminal scheme was alleged. The complaint alleged that Northwestern Bell bribed members of the Minnesota Public Utilities Commission (MPUC) over a 6-year period for the purpose of inducing them to approve excessive rates for the company.

Although the Court rejected the suggestion that a pattern could be established merely by proving two predicate crimes, it also rejected the Eighth Circuit’s requirement that a pattern of racketeering activity requires separate illegal schemes. Instead, the Court wrote, the pattern concept is sufficiently broad and flexible to encompass “multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity.”⁶⁵

The Court observed that the definition of “pattern of racketeering activity” expressly addresses only the minimum number of predicate crimes but “assumes” that something more is required.⁶⁶ Looking to the “ordinary” meaning of the term pattern, the Court found that a pattern is characterized by an ordering or arrangement that links the constituent parts of a whole. The ordering principles the Court found appropriate for a RICO pattern were, as previously articulated in *Sedima*, continuity and relationship. That is, the predicate crimes must be related, and they must constitute or threaten continued criminal activity.

The Court noted that although the proof of continuity and relationship will often overlap, for analytical purposes the two elements should be stated separately. Finding the relatedness element the simplest of the two, the Court drew upon Title X of the Organized Crime Control Act, which provides for enhanced sentences for certain offenders who have previously committed a felony as part of a pattern of criminal conduct. Unlike RICO, Title X defines the term “pattern” in qualitative rather than quantitative terms, and the definition emphasizes the relationship between criminal acts.

The Title X pattern requirement is satisfied if the criminal conduct “embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.”⁶⁷ Finding no evidence that Congress intended a more restrictive relationship requirement for a RICO pattern, the Court was satisfied that the Title X definition provided sufficient guidance on the RICO relatedness element.

Turning next to the continuity requirement, the Court observed that because continuity or threat of continuing activity may be proved in so many ways, it is difficult to generalize or to formulate an abstract test. But the Court went on to state that continuity is essentially a temporal concept that is both closed- and open-ended.

It is closed-ended in that continuity may be established over a closed period of time through proof that related crimes were committed over a substantial period of time. Thus, according to the Court, the evidence must establish long-term criminal conduct, not conduct that occurs during a period of a few weeks or months and that does not threaten future criminal activity.⁶⁸ A hoodlum, who sells vandalism “insurance” to neighborhood shopkeepers and who promises to collect monthly payments to continue the protection, specifically threatens indefinite repetition of the extortionate acts. Similarly, a legitimate business that commits predicate crimes in the normal course of business would satisfy the continuity requirement.

Applying this analysis to the facts of the case, the Court concluded that the civil complaint was sufficient to allege a RICO pattern under several alternative theories. First, all of the predicate crimes were bribes given for the common objective of influencing MPUC members in the conduct of their official duties, and the bribes were allegedly paid with some frequency over a 6-year period of time. If proven, those allegations would establish continuity. Second, if proven, the allegations could establish a threat of continued racketeering activity if the evidence showed that Northwestern Bell regularly conducted its business by paying bribes or that Bell's payment of bribes was a form of participation in the conduct of MPUC, a RICO enterprise. Thus, the complaint should be reinstated.

Whether the Court's refinement of its thinking on the pattern requirement will reduce the confusion and conflict in the lower courts remains to be seen. At least three members of the Court thought not.

In a strongly worded concurring opinion, Justice Scalia found the continuity plus relationship test "about as helpful . . . as 'life is a fountain.'"⁶⁹ After taking his colleagues to task for ignoring settled rules of statutory construction by borrowing the Title X definition, Justice Scalia further found the borrowed definition itself was vague. Would predicate crimes be sufficiently related, he wondered, if all of the victims were the same gender? If all of the crimes were committed for the purpose of enriching the defendant? Or if all of the others who participated in the unlawful conduct were co-employees? Justice Scalia complained that the statutory definition relied upon by the Court provided precious little guidance on these matters.

Likewise, Justice Scalia found the continuity analysis flawed. If the unlawful conduct "does not last *too long*," he posited, the continuity requirement provides a safe harbor for the first few months of racketeering activity. If the Court's hypothetical hoodlum had committed extortion in eight different cities on eight consecutive days and then disbanded, for example, that would not constitute a RICO pattern because there is no threat of future criminal activity.

But Justice Scalia acknowledged that it would be hard to provide more specific guidance on what constitutes a RICO pattern because the statute itself is so vague. Thus, although the RICO pattern requirement was not challenged as being void for vagueness in this case, Justice Scalia virtually invited a constitutional challenge by observing that the Court's inability to provide more than "meager guidance bodes ill for the day when that challenge is presented."⁷⁰

Substantive RICO Violations

Although § 1962 defines four distinct ways in which RICO may be violated, each species of violation requires proof of all of the key concepts discussed earlier. Thus, the heart of the substantive violation is the interrelationship between these various concepts.

Section 1962(c)

The vast majority of civil RICO actions are brought under § 1962(c).

That section makes it unlawful for any person who is employed by or associated with a RICO enterprise "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Thus, in addition to the key concepts discussed above, a § 1962(c) violation requires proof of two additional elements: (1) a person employed by or associated with an enterprise, who; (2) conducts or participates in the conduct of the affairs of the enterprise.

Person Employed by or Associated with an Enterprise.—Because the term "person" is defined to include both individuals and entities capable of holding a beneficial interest in property,⁷¹ both natural and juristic persons may be designated as the person who engages in the prohibited conduct. But the requirement that the person must be employed by or associated with the enterprise is a limiting element with respect to identifying the person and the enterprise. The overwhelming majority of circuits have ruled that under § 1963, the "person" and the "enterprise" must have separate identities because of the conceptual difficulty of holding that an enterprise may be employed by or associated with itself.⁷² Thus, the complaint may not identify the defendant as both the person who commits the offense and the enterprise through which it is committed.

Although the Seventh Circuit subscribes to that position, it has carved out two narrow exceptions: (1) a subsidiary (the person) may conduct the affairs of the parent corporation (the entity) in violation of § 1962(c);⁷³ and (2) a sole proprietor (the person) may associate with his sole proprietorship (the enterprise) if the proprietorship has other employees and is thus practically separate from the proprietor.⁷⁴

Illustration 5a: A, the president of a contracting corporation, regularly pays bribes to B, the head of a state highway transportation department, for the purpose of obtaining favorable treatment. Because A is employed by the corporation, A can be designated the person and the corporation the enterprise in a civil RICO suit. Because the person and the enterprise must be separate and distinct, the corporation may not be designated as both the person and the enterprise.

Illustration 5b: The same facts as in Illustration 5a. Because A is associated with the highway transportation department, A can be designated the person and the department the enterprise in a civil RICO suit.

Note that by naming A as the person in Illustrations 5a and 5b, A has been identified as the wrongdoer and, hence, will be the RICO defendant. But that result fails to reach the corporation's deep pocket. Since the corporation is named as the enterprise in Illustration 5a, respondeat superior principles may not be used to impute A's liability to the corporation in a § 1962(c) suit because that provision requires that the person and the enterprise must be separate and distinct.⁷⁵ But the corporation could be made a defendant in Illustration 5b, directly, by naming the corporation as a person associated with the highway transportation department or, perhaps, indirectly by imputing A's wrongful acts to the corporate entity.

Conducting or Participating in the Conduct of.—To violate § 1962(c), the person must conduct or participate, directly or indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity. Under the majority view, the racketeering activity may, but need not, advance the interests of the enterprise for the affairs of the enterprise to be conducted “through” a pattern of criminal conduct.⁷⁶ Thus, when a legitimate enterprise is used as a cover for unrelated racketeering activity⁷⁷ or the activity actually harms the enterprise,⁷⁸ the requisite relationship between the racketeering activity and the enterprise may still be present.

Illustration 6a: A, the president of a highway construction company, routinely pays bribes to B, a federal highway contracting official, to obtain favorable treatment for the company. A participates in the conduct of the company's affairs through a pattern of criminal conduct that advances the interests of the company.

Illustration 6b: A, the owner of a construction company that does legitimate business with the state, also uses the company as a front for selling cocaine. Because most of the drug deals are consummated over the company's telephone, A uses code words like “competitive bidding,” “cost-plus,” “no bid,” “asphalt,” “concrete,” and other terms used in the conduct of the construction business. A has participated in the conduct of the company's affairs through his unlawful drug activity.

Illustration 6c: A, the treasurer of a construction company, keeps a double set of books. The first set, which A keeps at home, accurately reflects the amount the company has billed and received for its services. The second “official” set, understates those figures by 2 percent, the amount that A systematically embezzles from the company. A has participated in the conduct of the company's affairs through his criminal conduct.

The Fifth Circuit has adopted a three-part test for determining whether the necessary relationship exists between the racketeering activity and the enterprise: (1) the defendant must have engaged in racketeering activity; (2) the defendant's position in or affiliation with the enterprise must have facilitated the racketeering activity; and (3) the racketeering activity must have affected the enterprise.⁷⁹ The activity need not have a beneficial effect, however, so long as it affects the enterprise “in some fashion.”⁸⁰ Thus, [t]he effect may be direct, such as the deposit of money in the enterprise's bank account, or indirect, such as the retention of the enterprises's existing clients.⁸¹

Because § 1962(c) encompasses indirect participation in the enterprise's affairs, it is unnecessary that the actor must have participated in the management or operation of the enterprise.⁸²

Illustration 6d: In Illustration 6a, A is also associated with the state highway office and, through the regular payment of bribes, has participated indirectly in the affairs of the office (an enterprise). A's conduct has had an effect on the office in that contracts are let corruptly rather than on the merits.

Illustration 6e: In Illustration 6b, B, who is not on the company's payroll, is A's partner in the cocaine business. By prearrangement B regularly calls A's office and A, through the contracting-related code words, instructs B regarding the amount of cocaine to sell to whom and for what price. B has participated indirectly in the use of the company (the enterprise) as a front for the drug business.

Section 1962(b).—A § 1962(b) violation is committed by acquiring or maintaining any interest in or control of an enterprise through a pattern of racketeering activity. Thus, like § 1962(c), § 1962(b) requires, in addition to the key concepts discussed above, proof of two additional elements.

Illustration 7a: A, high ranking employee of a construction company, for years accepts bribes from B, the president of a supplier, to award overpriced supply contracts to B's company, which becomes dependent on the business. A first solicited the bribes with the intention of later threatening to discontinue the practice unless B arranged for A to be selected as a director on the board of B's company. The plan succeeds. Although A does not dominate B's company, A has acquired some control over it through his pattern of bribery.

Illustration 7b: A, the chief financial officer of a highway contractor, is utterly incompetent. But A has been able to retain his position because he mails false financial statements to the stockholders. A has maintained control over the business through his unlawful conduct.

Illustration 7c: Under the facts of illustration 7a, A's scheme is not to be named to the board of directors but is, instead, to obtain 5 percent of the stock in company B. If the plan succeeds, A has acquired an interest in an enterprise through a pattern of illegal conduct.

At least two circuits have held that, contrary to the § 1962(c) requirement that the enterprise and the person may not be the same, § 1962(b) does not require that they be distinct.⁸³

Illustration 7d: Corporation A mails false financial statements that make the company's financial picture look grim and manipulates stock prices to induce investors to sell. In reality, the company is financially healthy and is about to receive a lucrative government contract that will boost the price of the stock. The Corporation has instructed its brokers to buy every share that they can. The Corporation (a person) has acquired an interest in itself (an enterprise) through mail fraud and stock fraud.

Section 1962(a).—Actions alleging a violation of § 1962(a) focus on the investment of illegally gotten gains to acquire an interest in or to establish or operate a RICO enterprise. In addition to the five key concepts that are common to all RICO actions, the § 1962(a) suit requires three additional elements: (1) receipt of proceeds of racketeering activity; (2) investment of all or part of those proceeds; (3) for the purpose of acquiring an interest in or to establish or operate an enterprise. Both the receipt of racketeering income and its investment to achieve the object stated in (3) may be either direct or indirect.

Section 1962(a) expressly exempts some purchases of securities in the open market. Exempted from the reach of this provision are purchases on the open market that are made for investment purposes only—not for purposes of obtaining control of the issuer—provided that the amount held by the purchaser, his accomplices, and his immediate family equals less than 1 percent of the outstanding securities of any one class and does not confer the power to elect a director of the issuer.

As is true under § 1962(b), courts that have considered the point have held that the enterprise and the person may be the same.⁸⁴

Section 1962(d).—Next to § 1962(c), § 1962(d) ranks among the most important of the RICO theories of liability. The wording of § 1962(d) is simple: “It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.” Thus, to state a subsection (d) cause of action, it is necessary to allege a conspiracy that has as its object the violation of one of the other subsections. Alleging the conspiracy, however, is not as simple as it might first seem.

Although the Fifth Circuit caused considerable confusion by coining the term “enterprise conspiracy,”⁸⁵ the enterprise and conspiracy elements must be kept separate and distinct. The enterprise is an entity. The conspiracy is an agreement that relates to the entity.

The principal difficulty with the conspiracy allegation, like so many problematic elements in the RICO scheme of liability, is definitional. The statute does not define what it means by “conspiracy.” Although there seems to be little disagreement that conspiracy requires an agreement between two or more persons, there is considerable disagreement over just what the conspirators must agree to and what, if anything, they must do.

1. **General Conspiracy Law.** Under general federal conspiracy law, a conspiracy is an agreement, tacit or express, between two or more persons to achieve an unlawful goal. To become a member of a conspiracy, one need only know the general nature of the conspiracy and its purpose and be a knowing participant in it. Because each conspirator’s participation must be for the purpose of advancing the goals of the conspiracy, each conspirator must also possess the culpable mental state required by the object offense.

Illustration 8a: A and B, both highway contractors, agree to give a generous Christmas gift to C, a governmental official, on the condition that C approves a lucrative construction contract under which A and B would profit handsomely. A and B have conspired to commit bribery. Both A and B have the corrupt motive needed to commit bribery.

2. **Wharton’s Rule.** One generally recognized limitation on conspiracy liability is known as Wharton’s rule. Simply stated, when a conspiracy has as its object an offense that itself requires a plurality of parties, Wharton’s rule precludes prosecuting the necessary participants in the object offense for conspiracy unless the conspiracy includes an extra “third party.”⁸⁶

Illustration 8b: In Illustration 8a, A and C agree that C will approve the lucrative project on condition that A provides C with a large cash gift. Because this agreement includes only the necessary participants for the crime of bribery (i.e., a bribe giver and a bribe receiver), A and C have not conspired to bribe C. If, on the other hand, A, B and C all agree to the plan, all three have conspired to commit bribery.

Although conspiracy is not itself a RICO predicate crime, these principles have two potentially powerful applications in a civil RICO action.

First, recall that state predicate crimes are offenses *involving* designated generic categories of crimes, including bribery, that are chargeable

under state law. It seems logical that a conspiracy to commit bribery would satisfy that requirement. But this backdoor approach should work only if the agreement does not run afoul of Wharton’s rule.

And second, although it is by no means a foregone conclusion, these principles could arguably serve to limit actions brought under § 1962(d). If, for example, A and C above are charged with conspiring to violate RICO through a pattern of racketeering activity (i.e., by bribing C), it is possible, but by no means certain, that Wharton’s rule might defeat that conspiracy theory.

3. **Overt Act.** One of the clearest cut controversies about the contours of RICO conspiracy law is whether RICO conspiracies require an overt act. When conspiracy statutes require an overt act, that simply means that at least one of the conspirators must have committed some act in furtherance of the scheme. But the act need not be unlawful in itself. It need only provide some evidence that the conspiracy is at work.

Illustration 8a: B and C conspire to bribe A to get A to approve a highway project in B’s state. B telephones A to arrange a meeting at which B plans to sound out A’s feelings about the project. The telephone call is an overt act in furtherance of the conspiracy.

While the First, Second, Sixth, and Ninth Circuits state that an overt act is not an element of a RICO conspiracy,⁸⁷ the Fourth and Fifth Circuits—and an errant Eleventh Circuit opinion as well—suggest that an overt act is required.⁸⁸ Section 1962(d) is, predictably, silent on the point.

This dispute undoubtedly springs from the inconsistent treatment federal law accords conspiracies. Although some federal conspiracy statutes (including the general conspiracy statute) expressly require an overt act,⁸⁹ others (including the major drug conspiracy provisions) do not express such a requirement.⁹⁰ Courts construing the latter category of statutes in non-RICO contexts consistently follow the long settled common-law rule that no overt act is required.⁹¹

Why an overt act requirement should be grafted onto the RICO conspiracy provision is not readily apparent. The overt act requirement is an exception to the common-law rule that an agreement, standing alone, is sufficient. Thus, it is almost invariably a requirement imposed by express statutory language. As the Supreme Court wrote in a comparable context: “[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning for which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such a case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.”⁹²

4. **RICO Agreements.** A second controversy over the RICO conspiracy provision relates to the substance of the conspiratorial agreement. A minority of courts have articulated a requirement that each member of the conspiracy must agree to personally commit predicate crimes,⁹³ while

the majority have found that far less will suffice.⁹⁴ Under the majority view, it is sufficient that the members of the conspiracy agree to the commission of predicate acts as part of a RICO violation by someone. That view is consistent with the common-law rule that members of the conspiracy need only agree to the commission of the object offense, not that each member must agree to personally participate in its commission.⁹⁵

Notwithstanding these critical disagreements over a critical theory of RICO liability, the Supreme Court has refused to grant *certiorari* to resolve the conflict, once over a short but vigorous dissent registered by Justice White.⁹⁶

Standing

The standing requirements for a civil RICO action are relatively few in number. The statute confers a cause of action upon any person: (1) who has been injured in his business or property; (2) by reason of; (3) a RICO violation. That is not to say, however, that the standing issue has provided less grist for the litigation mill than other controversial requirements discussed above.

First, there is the question of what constitutes injury to business or property. Before the Supreme Court addressed this question in 1985, the law was in a state of disarray. Some courts held that an ill-defined (and undefinable) special "racketeering injury" (i.e., an injury different from the harm caused by individual predicate crimes) was required. Other courts held that a "competitive injury" was required. Still others declined to hold that any special type of injury—apart from one to business or property—was required.

The Supreme Court tidied up the mess in *Sedima, S.P.R.L. v. Imrex Co.*, flatly rejecting any special racketeering injury requirement.⁹⁷ The "essence" of a civil RICO violation, according to the Court, "is the harm caused by predicate acts sufficiently related to constitute a pattern."⁹⁸ That is the harm that the injury to business or property requirement was designed to address, in the Court's view.

In the course of considering what kind of injury will confer standing, the Court in *Sedima* also indirectly addressed the second standing requirement, namely that the injury must be "by reason of" a RICO violation. In the passage quoted in the preceding paragraph, the Court made clear that the injury must be causally related to the violation. The harm must "flow from" the predicate acts.⁹⁹ In a footnote explanation the Court reiterated that compensable harms are harms "proximately caused" by the wrongful conduct.¹⁰⁰ Thus, harms that are directly caused by the violation and harms that "ultimately and indirectly" flow from the violation are compensable.¹⁰¹

Illustration 9a: A, a highway contractor, regularly bribes B, a state highway transportation official, to induce B to award contracts to A rather than to C, a competitor. The bribes are related and constitute a pattern. B routinely awards the contracts to A, when C would otherwise have received some or all of them.

C's business has been directly injured by reason of the pattern of bribes.

Illustration 9b: In Illustration 9a, the bank refuses to extend C additional credit because of C's lagging business with the state. C has suffered another injury to his business, this harm flowing more indirectly from B's pattern of racketeering activity.

Note that in Illustration 9b C's indirect injury was *in addition* to a direct injury. The Court in *Sedima* did not directly address the question where one whose *only* injury is indirect has a RICO cause of action. On that question there is a conflict in the circuits, with the Fifth Circuit holding that indirect injury, standing alone, is insufficient,¹⁰² and the Eighth Circuit holding that the direct/indirect distinction is irrelevant to the standing issue.¹⁰³

The third standing requirement, the existence of a RICO violation, briefly occupied the limelight when the Second Circuit held that the civil RICO defendant must have been *convicted* of a RICO violation before a cause of action would lie.¹⁰⁴ The Court in *Sedima* quickly dispensed with that issue. Support for a prior criminal conviction requirement could be found in neither the text of the statute nor its legislative history. To the contrary, the statute requires a RICO "violation," which simply means that it must be shown that the defendant failed to comply with the requirements of the law.¹⁰⁵

Two spinoffs of the direct/indirect injury debate are worth noting. First, if a corporation is injured by a RICO violation, the cause of action belongs to the corporation, not to the shareholders. Thus, the shareholders may sue only in a derivative action, not in their individual capacities.¹⁰⁶ Similarly, a governmental entity that is injured by reason of a RICO violation has a RICO cause of action in its own right.¹⁰⁷ It does not, however, have standing to sue in a representative capacity to recover damages to its citizens in a civil RICO suit.¹⁰⁸

Pleading and Proof

A civil RICO complaint must plead all elements of a RICO cause of action with sufficient particularity to comply with the Federal Rules of Federal Procedure notice pleading requirements. Thus, a civil RICO complaint must allege: (1) all of the elements of a § 1962 violation; (2) all of the elements of the predicate crimes that comprise the racketeering activity; and (3) an injury to business or property caused by the violation.

In suits premised upon species of fraud (e.g., mail or wire fraud), the fraud must be pled in accordance with Civil Rule 9(b), which requires that the circumstances of the fraud must be stated with particularity, including "the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby."

The statute does not specify what burden of proof a civil RICO plaintiff must satisfy. Although it is generally accepted that proof by a preponderance of the evidence is sufficient,¹⁰⁹ the Second Circuit has suggested the possibility of requiring clear and convincing evidence of the criminal conduct elements of the cause of action, while settling for proof of the other elements of the claim by a preponderance of the evidence.¹¹⁰

The Supreme Court did not resolve the issue in *Sedima*, but it did express strong doubts that RICO plaintiffs should be required to satisfy a higher burden of proof with respect to the predicate crimes. The Court observed that in numerous other contexts criminal conduct may be proved by a preponderance of the evidence in a civil action, and found "no evidence that Congress sought to depart that general principle here."¹¹¹ Since then, the Third, Seventh and Ninth Circuits have reaffirmed that the plaintiff may prove all of the elements of a civil RICO cause of action by a preponderance of the evidence.¹¹²

As one would expect, collateral estoppel principles apply to civil RICO actions. Thus, if the same facts have been previously litigated in a state court action¹¹³ or if the defendant has previously been convicted of the predicate crimes upon which the civil RICO action is based,¹¹⁴ collateral estoppel precludes relitigating those same issues in a civil RICO suit.

Damages, Costs, and Attorneys' Fees

The most compelling reason civil litigants find for including civil RICO counts in their complaints is RICO's liberal remedies provision. A RICO plaintiff who establishes an injury to business or property that is caused by a RICO violation "shall recover" treble damages.¹¹⁵ In addition, a prevailing RICO plaintiff is also entitled to recover "the cost of the suit, including a reasonable attorney's fee."¹¹⁶

The provision for recovery of attorneys' fees has produced two notable decisions, one dealing with plaintiffs who prevail through settlement, the other dealing with plaintiffs who pursue related claims that derive from a common fact pattern.

In *Aetna Casualty & Surety Company v. Leibowitz*,¹¹⁷ the Second Circuit held that plaintiffs who negotiate a settlement of their civil RICO claims rather than prosecuting them to judgment are not entitled to recover attorneys' fees. The court based its conclusion on a long line of decisional law under an identical remedy provision contained in the Clayton Act.¹¹⁸ When Congress borrowed the Clayton Act language and incorporated it into RICO, it was well settled that attorneys' fees could be recovered only by plaintiffs who were awarded damages at the conclusion of trial—not, as here, by those who obtain preliminary injunctive relief and then settle through negotiation. The court reasoned that if Congress had intended a different result under RICO, it would not have borrowed the Clayton Act language verbatim.

In *Abell v. Potomac Insurance Company*,¹¹⁹ the Fifth Circuit addressed the question of how to treat plaintiffs who successfully pursue related RICO, federal securities law, and state fraud claims. Following the rule that it invokes in other contexts in which attorneys' fee awards are authorized, the court held that fees incurred for work on all of the related claims are allowable.¹²⁰

Notwithstanding the powerful incentive that RICO's remedial policy provides, potential RICO litigants would be well advised to exercise restraint. Rule 11 of the Federal Rules of Civil Procedure authorizes judicial imposition of monetary sanctions against those who pursue frivolous claims. Those sanctions may include awarding attorneys' fees to

numerous opposing parties who are represented by numerous opposing counsel¹²¹ and the awarding of double costs.¹²² Federal courts, impatient with apparently frivolous civil RICO claims, are resorting to Rule 11 sanctions with ever increasing regularity.¹²³

Limitation of Actions

The civil RICO statute does not specify what statute of limitations governs a civil RICO cause of action. Typically, when no period of limitations is provided for a federal cause of action, federal law governs when the cause of action accrues (i.e., when the plaintiff knew or should have known of the injury)¹²⁴ and state law governs the duration of the limitations period (i.e., courts borrow the most closely analogous state statute of limitations).¹²⁵ Predictably, a split of authority developed with respect to how the courts should determine what the appropriate period of limitations is. Although most courts made particularized decisions based on the facts and circumstances of each case,¹²⁶ the Third and Seventh Circuits broke rank in 1986 and held that all civil RICO actions within a particular jurisdiction should be governed by a uniform period of limitations.¹²⁷

In resolving this conflict, the Supreme Court took an unprecedented course of action and borrowed a federal statute of limitations to govern civil RICO actions.¹²⁸ Finding in the Clayton Act a closer analogy to civil RICO than any state statutes that had been considered by the lower courts, the high Court borrowed the Clayton Act's 4-year limitations period. Hence, a civil RICO cause of action must be brought within 4-years of the time when the plaintiff discovers or should have discovered the injury.

Jurisdiction

One notable point on which the civil RICO statute is utterly silent is that of jurisdiction. Although it is clear that the statute creates a federal cause of action, whether federal courts have exclusive jurisdiction over civil RICO suits is not clear. This critical question produced more than a dozen conflicting decisions in federal and state courts.¹²⁹

Early in its 1989 term, the Supreme Court held in *Tafflin v. Levitt*¹³⁰ that state courts have concurrent jurisdiction over civil RICO claims. In our system of dual sovereignty, state courts are presumptively competent to adjudicate claims arising under federal law. That presumption can be rebutted "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."¹³¹ But here the Court could find nothing in RICO or its legislative history that would support a conclusion that recognition of concurrent state court jurisdiction would be inconsistent with congressional purpose.

Arbitration

The Federal Arbitration Act establishes a "federal policy favoring arbitration"¹³² and directs federal district courts to "rigorously en-

force" arbitration agreements.¹³³ Thus, absent a contrary congressional directive, the policy favoring arbitration extends to resolution of many types of disputes, including those involving federal statutory rights.

Until 1987, the circuit courts of appeal were in conflict on the question whether this policy applied to agreements to arbitrate disputes arising under RICO. Then, in *Shearson/American Express v. McMahon*,¹³⁴ the Supreme Court held that agreements to arbitrate claims that implicated a RICO cause of action are indeed enforceable. The Court could find no congressional intent expressed in either the statute or its legislative history to override the strong federal policy favoring arbitration of disputes.

COLLUSIVE BIDDING PRACTICES IN THE HIGHWAY CONSTRUCTION INDUSTRY

The Bidding Process

For purposes of civil RICO liability, the highway construction bidding process is highly vulnerable. The bidding process generally follows along these lines. After initial plans are drawn up, the state highway department engineer prepares an estimate of the cost of various components of the project (such as grading, underlay, paving and bridge construction) and of the total cost of the project. A total estimated contract price is then determined by adding to the total project cost what is thought to be a reasonable profit margin. At that point the state will set an "overbid" price that represents the point at which bids will be rejected.¹³⁵ The state then advertises the project and invites bids within a designated period of time.¹³⁶

Bid Rigging

Bid rigging is collusive conduct by qualified bidders to determine privately who will win a public contract advertised for competitive bidding. Bid rigging has attracted more attention than any other law enforcement problem in the highway construction industry. Between 1979 and 1983 alone, more than 400 individuals or companies were convicted of bid-rigging-related crimes.¹³⁷ Indeed, in some regions of the country bid rigging has been considered a way of life for decades.¹³⁸

Bid rigging in the highway construction industry has proven to be costly to the taxpayers. In Georgia, for example, road construction costs averaged 10 percent above the state engineers' estimates. After a grand jury investigation revealed widespread collusion in 1981, a number of collusion rings were broken up by criminal prosecutions. Highway construction costs then dropped to 10 percent below the engineer estimates.¹³⁹

Two forms of collusive bidding are prevalent in the highway construction industry. The first is a simple rotation system. Participants in the bid-rigging scheme create a rotation for entire projects or specified parts of projects. The firm whose turn it is to be awarded the bid will set its bid at or below the overbid price, while the other participants will submit higher, complementary bids. The "winning" bid may pass from firm to firm either on a strict rotation basis or on the basis of firm size and

profit needs.¹⁴⁰ In either event the firms normally remain profitable without engaging in competitive behavior, and the winning firm receives an amount that is not correlated to projected legitimate costs.¹⁴¹

A second collusive bidding practice, well known to the highway construction industry, allocates a specified territory to each firm. Within that particular geographical area, the same firm will always submit the winning construction bid, while other firms will submit complementary bids to provide the appearance of a competitive process.¹⁴²

Some collusion should be relatively easy to detect. First, the identity of the winning bidder may provide evidence of anti-competitive bidding, especially in territorial bidding schemes. Consider, for example, *United States v. Koppers Company*,¹⁴³ in which two road tar suppliers divided the state of Connecticut into two regions. From 1968 to 1974, all road tar contracts in the western region were awarded to one company, while all contracts in the eastern region were awarded to the other. Each company submitted complementary bids in the other's region to maintain the illusion of competitive bidding. But even when the scheme is not so readily apparent—as when a rotation system is in effect—after it has been in place for several years some discernable pattern regarding the winning bidder's identity may well emerge.

The amount of the winning bids may also provide evidence of collusion. In both rotation and territorial collusion, the winning bid is likely to be consistently at or near the overbid price.¹⁴⁴ If the bidding were truly competitive (i.e., if the outcome were not known before the contract was actually awarded), the firms would submit the lowest possible bids (i.e., bids that reflected each firm's performance costs plus a reasonable profit margin). Thus, the winning bids would tend to be below the overbid price.

Civil RICO Implications

The collusive bidding practices described previously are characterized by a number of features that suggest civil RICO implications. Both forms of collusive bidding tend to be self-perpetuating. All who are in the ring have a vested interest in its continued existence. It is unlikely that ring members will voluntarily relinquish inflated profits in exchange for competition on the merits.

Where bid rigging has become the rule rather than the exception, it is more likely than not that new entrants into the market will also participate. Even if a new entrant (or a disgruntled ring member) would prefer to bid honestly, members of the ring can be expected to close ranks in an effort to pressure recalcitrant firms into participating in collusive bidding. The ring may use any number of techniques, some coercive (as, for example, threats to person or business)¹⁴⁵ and some not (as, for example, a bribe).¹⁴⁶ Thus, in a geographic region where collusive highway construction bidding is pervasive, it is difficult if not impossible for an "outsider" to survive.

It is evident, then, that members of a collusion ring associate on a continuing basis. They must remain in communication if they are to

know when and at what level complementary bids should be made and to police the occasional problematic firm. They may even conceal their nefarious purposes under the guise of legitimate contractor associations.¹⁴⁷

That different contractors may be interested in different projects and thus do not bid on all of the projects does not undercut the unity of the arrangement. Bid-rigging rings often take on the character of an "institutional" or "structural" conspiracy that provides a somewhat permanent mechanism for activating contractors interested in particular types of projects.¹⁴⁸

These features of collusive highway construction bidding cry out for scrutiny under RICO. Although the possibilities for defining the RICO enterprise are legion, the "natural" target is the ring itself. It is an association of individuals and/or organizations. By naming the ring as the enterprise, all of the members—individuals and companies alike—may be named as defendants. They are "persons" who conduct or participate in the conduct of the enterprise through racketeering activity, most notably through bribery and mail and wire fraud. Because the racketeering acts are related to a common goal, are on-going, and threaten future criminal activity, they form a RICO pattern. Because the object of bid rigging is to create the appearance of competitive bidding while at the same time keeping the winning bid artificially high, the contracting government entity that unwittingly pays too much is injured in its property. Simply put, these facts add up to a civil RICO cause of action.

Illustration 10a: A group of contractors forms an association through which they exchange bidding information and rotate winning bids among themselves. Members of the association customarily meet the night before bids are submitted to determine the winning and complementary bids. Some of the contractors are interested only in bidding on state contracts, some only on county contracts, and still others on both. In consequence, not all of the contractors attend the same meetings.

When the state or a county approves a project, it invites potential bidders to write or call to obtain the specifications. The contracting entity then mails the specifications to interested parties. Once the contract is awarded, the governmental entity mails the winning bidder the contract. Checks representing project payments are similarly sent through the mails. Once the checks are deposited, the banks also use the mails as part of the clearing process.

The state or county could assert a RICO cause of action against the members of the contractors' association. By naming the association the RICO enterprise, the plaintiff avoids the § 1962(c) pitfall (previously discussed) of naming as the enterprise a party from whom recovery is sought. Thus, the members of the association may be named as the persons who conducted its affairs through a pattern of racketeering activity. That not all of the members participated in every bid rigging scheme is of no moment. They were part of an on-going fraudulent scheme that was conducted through the guise of a legitimate association, the enterprise.

In this illustration mail fraud constitutes the racketeering activity. The use of the mails in the contracting process was clearly foreseeable, and members of the association caused numerous mailings in furtherance of their scheme by requesting contract specifications, by receiving inflated contract awards and payment for performance of those contracts, and by depositing checks received in payment thereof.

The bidding ring may, but need not be, as formalized as the hypothetical contractors' association to implicate RICO.

Illustration 10b: In a locality where an informal rotation bidding system is observed, whenever a particular contractor needs a contract award to keep his business profitable, the contractor obtains from the county the list of contractors that have requested contract specifications. The needy contractor then telephones the others, explains his situation, and asks them to submit complementary bids. If an occasional maverick cannot be cajoled into submitting a complementary bid by friendly persuasion, the contractor who "needs" the contract pays the rival a bribe in exchange for his cooperation.

Assuming substantial continuity with respect to the identity of contractors who participate in this practice, this informal association of individuals and companies can constitute a RICO enterprise. As is true in Illustration 10a, numerous mailings will be connected with the operation of the scheme so that mail fraud will constitute racketeering activity through which the informal association is conducted. Additionally, if any of the telephone calls are interstate calls (including an intrastate call that the contractor does not know is routed interstate), wire fraud may be named as racketeering activity. Also, in addition, the periodic bribery of maverick contractors constitute commercial bribery. If that species of bribery is a crime that is punishable by more than one year in prison in the jurisdiction in which it occurs, then bribery may be added to the list of predicate crimes.

Illustrations 10a and 10b demonstrate how a contracting agency may suffer harm by reason of a RICO violation and thus have standing to sue. Although that is the most likely scenario, it is by no means the only one.

Illustration 10c: Company A, a paving contractor, expands its business into Erewhon County, a market in which bidding on public projects has long been controlled by a bid-rigging ring. After A enters the new market, the county invites bids for a new paving project and Company A asks for the specifications. B, a member of the bid-rigging ring, obtains a list of all contractors that have requested specifications and then calls a meeting of the "Erewhon County Contractors Association" (a.k.a. the bid-rigging ring). The Association decides which contractor will submit the winning bid and delegates to B the task of persuading Company A to submit a complementary bid.

A refuses to cooperate. Members of the Association threaten to take turns at underbidding the rogue firm until it goes under. A still refuses to cooperate. The Association makes good its threat and drives A out of business. A has been injured in its business by reason of the RICO violation.

The preceding discussion and illustrations relate to bid-rigging schemes that do not depend on the cooperation of a corrupt public official to succeed. The only corrupt parties are the colluding contractors. But bid-rigging schemes may take a quite different form.

Illustration 10d: A, a corrupt county highway purchasing agent, has responsibility for letting contracts to supply asphalt for a series of major paving projects in the county. All such contracts are required by law to be awarded to the lowest qualified bidder through a competitive secret bidding process. Under A's scheme, a predetermined bidder will win a contract at the highest possible bid that is lower than bids submitted by other contractors.

The scheme works as follows. The predetermined bidder secretly submits several pages of bid prices in a sealed envelope instead of the required single page. A reads all of the

competing bids first and then announces the highest bid B submitted that was lower than the competitors' bid prices. A then covertly throws the predetermined bidder's other bid pages in the wastebasket. A receives \$10,000 in exchange for rigging the outcome.

In this illustration, there are several possible ways to define the enterprise. Although courts frown on the practice of naming a governmental office as a RICO enterprise, the county highway department nonetheless satisfies the definition of an enterprise. Alternatively, A (the purchasing agent) and all of the contractors who participate in the scheme may be named as an "association in fact" type of enterprise. The enterprise (either the county highway office or the association of corrupt individuals) is being conducted through a pattern of racketeering activity—here, a pattern of state bribery offenses and, perhaps, mail fraud.

But of what significance is the submission of competitive bids in this case? The contracts are in fact awarded to the lowest bidder, and not all of the other bidders need be corrupt. Does that negate the existence of an injury to the county's business or property?

No. Notwithstanding that competitive bids were submitted, the county can still allege the requisite injury caused by the RICO violation.

To illustrate, suppose that on one occasion B, the predetermined bidder, submitted five bid sheets containing the following amounts: \$64,000, \$66,000, \$68,000, \$70,000, and \$85,000. The bids submitted by competitors were \$86,900 and \$89,000. A announces that B is the lowest bidder and awards the contract for \$85,000. The county has been injured because B's lowest bid indicates that B would have been willing to perform the contract for \$64,000, yet the county has to pay an additional \$21,000 because of the collusion.

Other Collusive Bidding Practices

Bid rigging is by far the most prevalent form of collusive bidding in the highway construction industry and has the far greatest potential for ripening into a civil RICO cause of action. Two other types of bidding procedures that present opportunity for fraud—the tailor bid and the discretionary award—should be briefly noted, however.

A tailor bid scheme is one in which a public official who defines the qualifications that contractors must have to be eligible to bid adopts criteria that only one contractor will satisfy. Although bidding officially occurs, it is far from competitive.

Tailor bidding schemes arise out of state statutes specifying that public works projects shall be awarded to "the lowest responsible bidder."¹⁴³ This common statutory scheme vests in some public official the discretion to determine who is a "responsible" bidder. The criteria for responsibility may relate to years of experience, financial stability, employment of disadvantaged or minority workers, or specialized experience and equipment needed to perform specialized tasks such as bridge building. By manipulating these criteria, a bribed official can ensure that a particular contractor will be awarded the contract.

The same statutes that create the possibility of tailor bids may also create the possibility of discretionary awards. That is, the statute may not require that the contract be awarded to the lowest bidder. It may, instead, authorize awarding it to a higher bidder who nonetheless submitted the "best bid." That, too, supplies both motive and opportunity for bribery.

Although both tailor bid and discretionary award schemes may provide

a foundation for civil RICO liability, they do not as readily lend themselves to that theory of liability as does bid rigging. That is true partly because these schemes are less likely to be on-going and, thus, to form a pattern of criminal activity, and partly because they are more difficult to detect. Notwithstanding obvious possibilities for fraud in both types of contracting procedures, the legitimate reasons for requiring certain qualifications or for awarding a contract to one other than the lowest bidder are legion. Thus, proving an improperly motivated decision may be extremely difficult.

Another critical difficulty in formulating a civil RICO cause of action in this context is the identification of a party who has suffered the requisite injury to business or property by reason of the illegal conduct. Although a government entity that pays an inflated amount in a discretionary award context will have suffered monetary harm, proof of injury in the context of a tailor bid may be somewhat more problematic. Proof that the contract did not require for its performance a contractor with specialized equipment is not necessarily proof that awarding the project to that contractor cost the government more.

The problem is compounded when a private party tries to formulate a cause of action in these situations. When qualifications for bidding are set so as to exclude potential bidders, the excluded parties can demonstrate the requisite injury only if they can establish a property right in the contract that was awarded to another party. Similarly, when a government official awards the project on the basis of the "best bid" instead of the lowest bid, the lowest bidder is injured only if he has a property interest in the contract before it was awarded.¹⁵⁰

Federally Assisted Highway Projects

As a general rule, federal law requires competitive bidding for all contracts to construct federal agency projects.¹⁵¹ The Federal-Aid Highway Act (FAHWA)¹⁵² similarly requires states to follow competitive bidding practices for highway construction projects funded wholly or partly by federal money. Although individual states may have their own competitive bidding laws, a state must adhere to FAHWA bidding procedures when constructing federally assisted highway projects unless it demonstrates that some other method is more cost effective.¹⁵³

Federal participation in state highway construction projects is essentially a four part process. First, Congress authorizes the maximum amount that the Secretary of Transportation may commit the federal government to spend on federal aid highway contracts during the next four fiscal years. The Federal Highway Administration then apportions the authorized amounts among the states and issues certificates that inform each state of the amount allocated to it. Subsequently, the states prepare programs of projects for which they expect to seek federal reimbursement and submit the programs for approval by the Federal Highway Administration (FHWA). After a program is approved and it is determined that the state has complied with all applicable statutory and regulatory requirements, the FHWA issues an authorization to proceed with all or part of the project. With that step the federal gov-

ernment becomes obligated to reimburse the states for the federal share of a programmed project.¹⁵⁴ And it is at this point that the funds are considered "expended,"¹⁵⁵ even though no funds have yet been transferred to the states.

A key issue that is likely to arise when a highway construction project is federally assisted is who is injured by reason of the violation. When bid-rigging activities result in the state's payment of an inflated price, some of which will be reimbursed by the federal government, which of the two entities—the state or the United States—has been injured by reason of the unlawful conduct?

Although the answer to this question is by no means clear, some guidance may be found in cases construing the False Claims Act¹⁵⁶ and the Clayton Act. The first guiding principle is that the United States must be injured in its business or property.

Illustration 11a: A false claim is made to seek release of private property that the government holds in the capacity of a bailee. Because the property belongs to a private party, the government is not injured and has no cause of action.¹⁵⁷

Illustration 11b: Individuals who rig bids for federal public works projects submit their fraudulent bills to local government authorities. The fund from which the bills are paid contains both local and federal money. The government has been injured and has a cause of action.¹⁵⁸

These examples are relatively clear cut. In Illustration 11a, the government had no real interest in the property. It was merely a custodian. In Illustration 11b, federal and state funds were commingled. Thus, a claim against the account was a claim against the federal government as well as the state.

When the funds in question are Federal-Aid Highway Act grants, the complexion of the problem changes. Consider, for example, the facts in *United States v. Azzarelli*.¹⁵⁹ In *Azzarelli*, the State of Illinois brought a treble damage action against the Azzarelli Construction Company alleging that the company's bid-rigging activities had resulted in its receipt of two contract awards to construct public highways, in violation of the Clayton Act. Both projects received 70 percent of their financing from the Federal Highway Administration, with the state providing the remaining 30 percent.

While the state's suit was still pending, the federal government leveled the same allegations against Azzarelli in a separate suit for damages under the Clayton Act and the False Claims Act. The government's theory was that it suffered an injury because the bid rigging resulted in the construction of fewer highway miles. Illinois intervened and moved to dismiss the federal government's suit, arguing that because the federal funds were deemed expended once the projects were approved, the funds against which the allegedly false claims were made were actually state funds in federal custody. Illinois prevailed in both the district court and the court of appeals.

The Seventh Circuit found it necessary to distinguish federal contributions made under the Highway Act and those made under "open-

ended" federal aid programs like Medicaid. An open-ended program is one in which the government's participation is based on a specified proportion of state program expenditures, and there is no fixed ceiling on the total amount of funds that may be spent. Thus, a Medicaid overcharge directly injures the federal government because it results in the expenditure of federal funds that would not be spent but for the overcharge.¹⁶⁰

Under the Federal-Aid Highway Act, in contrast, the government's annual contribution to a state is a fixed sum. Although an overcharge attributable to highway bid rigging may result in a state's expenditure of more of its federal grant money on a particular project, it will not affect the total amount of federal highway aid that the state receives. Thus, in the court's view, the system under which Federal-Aid Highway Act grants are awarded insulates the federal government from the overcharge.¹⁶¹ In consequence, Illinois paid the overcharges out of state, not federal funds.

Azzarelli, then, stands for the proposition that the state, not the federal government, is entitled to recover overcharges on Federal-Aid Highway Act projects. Thus, assuming arguendo that § 1964 provides the federal government a RICO cause of action for treble damages,¹⁶² an action would not lie in the context of Federal-Aid Highway Act grants because the United States is not the injured party.

But that is not the end of the matter. When the issue arises in a related context—that of whether the government may recoup overcharges that a state has recovered in a civil action against bid riggers—the result may be different.

Tennessee v. Dole is one of the few examples of cases in which the government has asserted recoupment rights in this context.¹⁶³ The *Dole* litigation was preceded by a federal bid-rigging prosecution of Tennessee highway contractors that resulted in criminal conviction of some 70 individuals and firms. The state sued many of the same contractors, settling some of the suits for around \$12 million.

Although the Antitrust Division of the Justice Department maintained that the government had not been injured in its property by reason of the bid rigging and thus had no interest in the state's recoveries,¹⁶⁴ the Federal Highway Administration asked the Tennessee Attorney General for information that would enable FHWA to compute its pro rata share of the amount the state had recovered.¹⁶⁵ The FHWA proposed to reduce the federal funding for Tennessee's current projects in an amount equal to the federal share of the state's recovery in the civil litigation, but then to restore the unprogrammed balance for future Tennessee highway construction projects.¹⁶⁶

When the Attorney General refused to supply the information, FHWA unilaterally determined its share of Tennessee's civil recoveries (more than \$4.5 million) and planned to deduct this amount from the highway funds previously allocated to the state. Tennessee filed an action for declaratory and injunctive relief, and prevailed in the district court.

Relying upon *State Highway Commissioner of Missouri v. Volpe*,¹⁶⁷ the court concluded that absent express statutory authority, FHWA

cannot withhold federal highway funds. Because Tennessee had complied with federal requirements in awarding and supervising the project and because the government could cite no other explicit statutory grounds for withholding the funds, the government's proposed course of action was wholly beyond its power, the court found.

The Sixth Circuit reversed, holding that the relationship between the federal grantor and the grantee state is governed by the law of unjust enrichment.¹⁶⁸ The court found that the district court was "clearly mistaken" in concluding that the government could not recoup grant moneys paid out through mistake.¹⁶⁹ The federal share of the project costs was anything but a no-strings-attached gift. The federal grant money could only be used for approved construction projects under contracts awarded as a result of honest and competitive bidding. The Tennessee settlements were premised on the theory that, had the state and federal governments known that the bid prices resulted from contractor collusion, the United States would not have funded the projects nor would the state have awarded the contracts. That being true, the federal share was paid to the state by mistake and could be recouped under common law unjust enrichment principles.

That the government was entitled to share the Tennessee settlements was only the beginning, however. The amount to which it was entitled could not be computed according to a rigid formula, for restitutionary principles are flexible. They contemplate balancing the equities in each case to determine precisely what constituted a "gain" to the enriched party and to what extent its retention would be "unjust."

To what extent, for example, did the state's independent efforts and expenditures contribute to its gain from the settlements? Surely the state incurred costs in pursuing lawsuits against the bid riggers. And to what extent should the amount the state is permitted to retain reflect the desirability of providing an incentive to pursue bid riggers in the future? Both state and federal governments benefit alike when the state recovers overcharges that represent federal and state shares of project costs.

Because "[t]he case was tried on an all-or-nothing basis—either the State is entitled to keep all the bid rigger money recovered or the federal officials are entitled to a full setoff and restitution of all of the federal share initially paid on the projects—"¹⁷⁰ these and other related questions could not be resolved on the present state of the record. The court thus remanded the case, instructing the district court to balance the equities before computing the amount the federal government was entitled to share.

Although *Dole* and *Azzarelli* are arguably inconsistent, the potential conflict seems more apparent than real. The court in *Azzarelli* concluded that the United States was not injured by the bid rigging and thus did not have a cause of action for damages against the bid riggers. The overcharges were paid out of funds belonging to the state. But the court in *Dole*, while finding that the United States was entitled to share in the state's recovery, did so on the ground that the state of Tennessee would be unjustly enriched if it retained the full amount of the settlements. Thus, the result in *Dole* is premised on considerations wholly unrelated to those controlling in *Azzarelli*.

To permit the state to spend federal-aid highway money on a project, then to recover the federal share of the excess payment and pocket the proceeds, would be to permit the state to retain a windfall. The state would either expend more federal money for construction projects than had been authorized¹⁷¹ or, as in *Dole*, divert some of the recovered federal-aid highway funds to nonhighway purposes¹⁷² in violation of federal law.¹⁷³ To permit the federal government to recoup its share of the excess payment would not, on the other hand, deprive the state of all use of the funds,¹⁷⁴ because the government maintained that the amount recouped would be made available for use by the state in future years.¹⁷⁵

BILLING AND PERFORMANCE FRAUD IN HIGHWAY CONTRACTS

When highway construction contracts are awarded fairly and without interference from dishonest bidders or corrupt public officials, the bidding process tends to insulate the project from billing and performance fraud. Because all proposed work and materials must be specified in the bid, the contractor will not be paid for work not included in the bid. Although it is possible for a contractor to obtain authorization to perform additional work, this usually requires an official change order approved by the government.¹⁷⁶ If fraud were suspected, the government agency responsible for the project would not approve the change order.

Notwithstanding the foregoing protections against billing and performance fraud inherent in the contracting process, that a project is bid and awarded fairly does not guarantee that the project will remain free from fraud and dishonesty.

Illustration 12a: A, a contractor who was awarded a contract to build a bridge, wants to increase profits on the project by adding unnecessary but expensive structural support at the strongest point in the span. A bribes B, the state highway engineer responsible for monitoring the project, to persuade his superiors to approve the change order.

Illustration 12b: A, a bidder on a bridge project, includes a specified quantity of Grade A concrete at a cost of \$10 per ton in the bid. Although A cannot obtain Grade A concrete for less than \$11 per ton, A deliberately understates the cost to come in as the lowest bidder. If awarded the contract, A intends to use Grade B concrete at a cost of only \$8 per ton in the construction of the bridge.

A receives the contract and uses Grade B concrete. When the state highway engineer responsible for monitoring the project calls that fact to A's attention, A bribes the engineer to look the other way. When A bills the government, the statement includes a charge for the Grade A concrete that was not used.

In Illustrations 12a and 12b, the government has been defrauded through conduct constituting bribery and, in all likelihood, mail fraud. Although these constitute RICO predicate crimes, they are more likely to be isolated or sporadic events rather than the ongoing criminal activities so obvious in bid-rigging rings. Thus, the odds that a plaintiff can establish a "pattern" of racketeering activity that satisfies the criteria the Supreme Court articulated in *H.J. Inc. v. Northwestern Bell* are relatively remote.

STATE RICO STATUTES

More than half of the states have enacted statutes that are patterned after RICO. Although these state laws parallel the federal statute in many respects, they also introduce myriad variations on the federal regulatory theme. While some of the variations are more restrictive than the federal model, others are considerably more expansive. The text in this section summarizes the major kinds of variations that will be found in the state statutes. The text is amplified by a Table of State RICO Laws that specifies the major components of each state RICO analog. The table is included in the Appendix to this report.

Although most state RICO analogs require a pattern of unlawful conduct, what constitutes a pattern differs from jurisdiction to jurisdiction. The most common variations increase the number of criminal acts or incidents required and reduce the period of time during which they must occur. A few jurisdictions forbid predicated civil liability upon a pattern that consists solely of mail, wire, or securities fraud. And, notably, a few dispense with the pattern requirement as a component of civil liability. Thus, they create liability for harm caused by racketeering activity *per se*.

What constitutes racketeering activity also varies widely from state to state, both in terms of the kinds of conduct covered and of the extraterritorial reach of the statute. The most notable common characteristic that state definitions of racketeering activity share is the inclusion of bribery and other state crimes enumerated in § 1961(1) as RICO predicate offenses. But in some states the definitions go well beyond those offenses to include other government-related offenses, state antitrust violations, illegal kickbacks, commercial bribery, false statements, schemes to defraud, environmental and hazardous substances violations, and the like.

Although some of the statutes apply only to racketeering activity occurring within the jurisdiction and chargeable under its laws, many statutes are extraterritorial in their reach. Some expressly incorporate the federal predicate crimes enumerated in § 1961(1) as state predicate crimes. Some also designate offenses occurring in other jurisdictions as predicate crimes if they are equivalent to an offense punishable within the home jurisdiction.

Although all of the state statutes incorporate the enterprise concept, that is an optional element of the liability scheme in one jurisdiction. Most definitions of the term "enterprise" closely parallel that in the federal law, with the most common variants being specific inclusion of licit and illicit organizations and of government entities as well.

State RICO liability is, in most instances, premised on conduct analogous to that prohibited in § 1962. The most common deviations are elimination of the investment offense defined in § 1962(a) or the conspiracy offense defined in § 1962(d).

Most, but not all, state RICO statutes authorize a private civil cause of action. Those that do often track the federal statute and provide for recovery of treble damages, costs, and attorneys' fees. But some contain significant variations. On the expansive side, some statutes authorize

treble damages and, when appropriate, punitive damages as well. Some also specifically contemplate the provision of equitable relief in private civil suits. In addition, some of the statutes do not limit the compensable harm to injury to business or property, as does the federal law.

Among the state provisions that narrow the scope of civil liability, the most restrictive provide for recovery of actual damages only. Others authorize recovery of double damages, and one makes the trebling of a damage award discretionary with the court.

Almost all of the little RICO laws authorize civil suits brought by the state, most commonly to prevent, restrain, or remedy a violation. A few permit the state to seek recovery of damages on behalf of an aggrieved party (or parties), and a few specify a maximum civil penalty that can be recovered by the state.

Several of the statutes address the burden of proof issue that remains to be definitively resolved under federal law, with the evidentiary standard running the gamut from a preponderance of the evidence to clear and convincing evidence.

FEDERAL CIVIL ENFORCEMENT POWERS

Apart from the power to prosecute RICO violations criminally, the federal government has considerable civil enforcement powers. The statute confers upon federal district courts jurisdiction to prevent and restrain RICO violations.¹⁷⁷ Included among the orders a court may issue are: (1) an order to divest an interest in an enterprise; (2) an order imposing reasonable restrictions on the future activities of any individual or organization; and (3) ordering the dissolution or reorganization of an enterprise. The Attorney General is empowered to institute civil proceedings to invoke this broad remedial jurisdiction.

Prior to instituting civil or criminal judicial proceedings, the Attorney General is authorized to issue a civil investigative demand to any person or enterprise believed to possess documentary materials that are relevant to a racketeering investigation.¹⁷⁸ As is true under antitrust law, the civil investigative demand can be an important discovery tool in RICO investigations in that it gives the government the power to compel individuals and organizations to produce documentary material for examination in much the same manner as would a grand jury subpoena.¹⁷⁹

Although the government's use of its civil enforcement powers is relatively rare, that it possesses those powers should not be discounted.

CONCLUSION

As this report illustrates, federal and state RICO laws are well adapted to reach practices prevalent in the highway construction industry. Although the bidding process is the most vulnerable point, it is by no means the only one.

It seems likely that the industry's exposure to civil RICO liability will increase during the coming years. Despite strong criticism and strident debate over what some view as unprecedented and unintended breadth of the federal statute, for example, Congress has not narrowed the scope of this powerful legislation. Indeed, while public attention has

centered on legislative proposals to limit civil RICO liability, Congress has quietly but consistently broadened the basis of criminal and civil liability during the last decade by adding new offenses to the list of predicate crimes. The most recent example of this can be found in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, which adds financial institution fraud to the definition of racketeering activity.¹⁸⁰ Thus, the prospect of significant relief from Congress is questionable at best.

The Supreme Court's role in the dialogue should not be overlooked, moreover. All of the Court's RICO decisions liberally construe the statute. The Court has emphasized that if RICO is being put to unforeseen or unintended uses, the remedy lies with Congress, not with the courts. But as experience has shown, Congress is willing to entertain, but reluctant to enact, narrowing legislation.

And last, the proliferation of state RICO statutes that in many instances provide a broader base for liability may substantially offset any gains RICO critics hope to win at the federal level. Thus, civil RICO actions will continue to occupy a prominent role in the resolution of business disputes.

¹ RICO was enacted as title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970). For an overview of the Act and its legislative history, see McClellan, *The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME L. 55 (1970).

² The legislative history sheds no light on this private cause of action.

³ *United States v. Hocking*, 860 F.2d 769 (7th Cir. 1988).

⁴ *United States v. Thompson*, 685 F.2d 993 (6th Cir.), *en banc*, *cert. denied*, 459 U.S. 1072 (1982).

⁵ *United States v. Vignola*, 464 F. Supp. 1091 (E.D. Pa.), *aff'd*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980).

⁶ *United States v. Long*, 654 F.2d 911 (3d Cir. 1981).

⁷ *State v. Buzz Berg Wrecking Co.*, 496 F. Supp. 245 (D. Md. 1980).

⁸ *United States v. Navarro-Ordas*, 770 F.2d 959 (11th Cir. 1985); *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Hewes*, 729 F.2d 1302 (11th Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985).

⁹ *Haroco v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 401 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (*per curiam*).

¹⁰ *Id.*

¹¹ See *infra* text accompanying notes 71-84.

¹² Alternatively, liability may be premised on collection of unlawful debt (i.e., gambling debt or usurious interest), but that type of problem is unlikely to be the basis of suits related to highway contracting abuses.

¹³ 18 U.S.C. § 201.

¹⁴ 18 U.S.C. §§ 1362, 1363.

¹⁵ The bribe giver need not know that the intended recipient is a federal official. The recipient's status is considered a jurisdictional fact that elevates the bribery to a federal crime. *United States v. Jennings*, 471 F.2d 1310 (2d Cir.), *cert. denied*, 411 U.S. 935 (1975). Thus, for example, one who mistakenly believes the intended bribe recipient is a state, rather than a federal official, nonetheless violates the federal bribery statute.

¹⁶ 18 U.S.C. § 201.

¹⁷ *United States v. Standefer*, 452 F. Supp. 1178, 1184 (W.D. Pa. 1978).

¹⁸ 18 U.S.C. § 201(a)(1).

¹⁹ See, e.g., *United States v. Kirby*, 587 F.2d 876 (7th Cir. 1978) (grain inspector acting on behalf of Department of Agriculture); *United States v. Fleetwood*, 528 F.2d 528 (5th Cir. 1976) (meat inspectors).

²⁰ *United States v. Griffin*, 401 F. Supp. 1222 (D. Ind. 1975), *aff'd mem.*, 541 F.2d 284 (7th Cir. 1976).

²¹ 104 S.Ct. 1172 (1984).

²² *Id.* at 1180.

²³ *Id.*

²⁴ 18 U.S.C. § 1341.

²⁵ *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967).

²⁶ See, e.g., *United States v. Bryza*, 522 F.2d 414 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976); *United States v. George*, 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973); *United States v. Procter & Gamble Co.*, 47 F. Supp. 676 (D. Mass. 1942).

²⁷ See, e.g., *United States v. Rauhoff*, 525 F.2d 1170, (7th Cir. 1975); *United States v. Faser*, 303 F. Supp. 380 (E.D. La. 1969).

²⁸ 483 U.S. 350 (1987).

²⁹ See, e.g., *United States v. Procter & Gamble Co.*, 47 F. Supp. 676 (D. Mass. 1942).

³⁰ 108 S.Ct. 316 (1987).

³¹ A host of other issues, too numerous to mention, remain unresolved. For identification and consideration of some of them, see, 2 K. BRICKEY, *CORPORATE CRIMINAL LIABILITY* §§ 8:24.9-8:24.14 (Supp. 1989).

³² 18 U.S.C. § 1365.

³³ It is not clear that the new statute reinstates the intangible rights doctrine in its broadest applications. See 2 K. BRICKEY §§ 8:24.11, 8:24.13 (Supp. 1989).

³⁴ *Periera v. United States*, 347 U.S. 1, 8 (1954).

³⁵ *United States v. Rauhoff*, 525 F.2d 1170 (7th Cir. 1975); *United States v. Sampson*, 371 U.S. 75 (1962).

³⁶ *Schmuck v. United States*, 109 U.S. 1443 (1989); *United States v. Rauhoff*, 525 F.2d 1170 (7th Cir. 1975); *United States v. Maze*, 414 U.S. 395 (1974).

³⁷ 18 U.S.C. § 1363.

³⁸ *Smith v. Ayers*, 845 F.2d 1360 (5th Cir. 1988).

³⁹ See, e.g., *United States v. Bryant*, 766 F.2d 370 (8th Cir. 1985); *United States v. Davila*, 592 F.2d 1261 (5th Cir. 1979), *cert. denied*, 424 U.S. 920 (1979).

⁴⁰ 18 U.S.C. § 1961(1)(A).

⁴¹ MODEL PENAL CODE § 240.1, Comment at 8 (Official Draft 1980).

⁴² MODEL PENAL CODE § 250.1(1).

⁴³ See *id.*, Comment at 9 n.10.

⁴⁴ See *id.*, Comment at 6 n.2.

⁴⁵ See *id.*, Comment at 9 n.11.

⁴⁶ The Comment to § 240.1 identifies and

discusses other points upon which state bribery laws may vary.

⁴⁷ H.R. REP. NO. 1549, 91st Cong. 1st Sess. 25, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS at 4032.

⁴⁸ *United States v. Nardello*, 393 U.S. 286, 195 (1969).

⁴⁹ *United States v. Forsythe*, 429 F. Supp. 715 (D. Pa.), *rev'd*, 560 F.2d 1127 (3d Cir. 1977). See also *United States v. Garner*, 837 F.2d 1404 (7th Cir. 1987).

⁵⁰ *United States v. Frumanto*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1968).

⁵¹ But cf. *United States v. Louie*, 625 F. Supp. 1327, 1334-1337 (S.D.N.Y.), *appeal dismissed*, 787 F.2d 65 (2d Cir. 1986) (declining to permit state offense defendant had been acquitted of to serve as predicate crime).

⁵² *United States v. Muskovsky*, 863 F.2d 1319 (7th Cir.), *cert. denied*, 109 S.Ct. 1345 (1988); *United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988), *cert. denied*, 109 S.Ct. 1637 (1989); *United States v. Licavoli*, 725 F.2d 1040 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984).

⁵³ It should be kept in mind, however, that the bribery scheme could implicate other federal criminal statutes (e.g., mail and wire fraud) that could bring the conduct within the purview of a RICO violation.

⁵⁴ See, e.g., ILL. REV. STAT. ch. 38 para. 29A-1; KAN. STAT. ANN. § 21-4405; MO. REV. STAT. § 570.150; N.J. REV. STAT. §§ 2C:43-6(a) (2-4); N.Y. PENAL L. §§ 180.40, 180.50; TEX. PENAL CODE ANN. § 32.42; VT. STAT. ANN. tit. 13 § 1108 (1989).

⁵⁵ See, e.g., *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958). See generally 1 K. BRICKEY, §§ 3:02-3:08 (1984).

⁵⁶ MODEL PENAL CODE § 2:07(1)(c).

⁵⁷ See Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 633-34 (1988).

⁵⁸ See *supra* text accompanying notes 40-54.

⁵⁹ *United States v. Licavoli*, 725 F.2d 1040 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984).

⁶⁰ *United States v. Muskovsky*, 863 F.2d 1319 1330-1331 (7th Cir.), *cert. denied*, 109 S.Ct. 1345 (1988).

⁶¹ 105 S.Ct. 3275 (1985).

⁶² *Id.* at 3285 n.14.

⁶³ *Superior Oil v. Fulmer*, 785 F.2d 252 (8th Cir. 1986).

⁶⁴ 109 S.Ct. 2893 (1989).

⁶⁵ *Id.* at 2899.

⁶⁶ *Id.* at 2900-01.

⁶⁷ 18 U.S.C. § 3575(e).

⁶⁸ 109 S.Ct. at 2902.

⁶⁹ *Id.* at 2907 (Scalia, J., concurring).

⁷⁰ *Id.* at 2909.

⁷¹ 18 U.S.C. § 1961(3).

⁷² *Old Time Enterprises v. International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989); *Ochishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988); *D & S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964 (7th Cir. 1988); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 839 F.2d 782, 790-92 (D.C. Cir. 1987); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306-07 (7th Cir. 1987); *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1358 (3rd Cir. 1987); *Luthi v. Tonka Corp.*, 815 F.2d 1229, 1230 (8th Cir. 1987); *Masi v. Ford City Bank & Trust*, 779 F.2d 397, 401 (7th Cir. 1985); *United States v. DiCaro*, 772 F.2d 1314, 1319-1320 (7th Cir. 1985); *Hirsek v. Enright Refining*, 751 F.2d 628, 633 (3rd Cir. 1984), *on remand*, 617 F. Supp. 49 (D.N.J. 1985); *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 400 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curiam); *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984); *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982), *on reh'ing*, 710 F.2d 1361 (1983), *cert. denied*, 464 U.S. 1008 (1983); *United States v. Hartley*, 678 F.2d 961, 988 n.3 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). *But see* *Computer Sciences*, 689 F.2d 1181, 1190 n.3 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), *contra*.

⁷³ *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 402-03 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (per curiam).

⁷⁴ *United States v. Benny*, 786 F.2d 1410, 1415-16 (9th Cir.), *cert. denied*, 479 U.S. 1017 (1986); *McCullough v. Suter*, 757 F.2d 142, 143-44 (7th Cir. 1985).

⁷⁵ *See supra* text accompanying notes 71-74.

⁷⁶ *United States v. Carlock*, 806 F.2d 535, 546 (5th Cir.), *later proceeding*, 806 F.2d 556 (1986), *cert. denied*, 480 U.S. 949 and 480 U.S. 950 (1987); *United States v. Jonan*, 800 F.2d 164 (7th Cir. 1986); *United States v. Ellison*, 793 F.2d 942, 950 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986); *United States v. Cauble*, 706 F.2d 1322, 1333 n.24 (5th Cir. 1983), *cert. de-*

nied, 465 U.S. 1005 (1984); *United States v. Webster*, 669 F.2d 185 (4th Cir. 1982), *modifying*, 639 F.2d 174 (1981), *cert. denied*, 456 U.S. 935 (1982); *United States v. Barber*, 668 F.2d 778 (4th Cir.), *cert. denied*, 459 U.S. 829 (1982); *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978); *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978), *reinstated in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979). *But see* *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978), *contra*.

⁷⁷ *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978).

⁷⁸ *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978), *reinstated in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979).

⁷⁹ *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984).

⁸⁰ *Id.* *Cf.* *United States v. Feldman*, 853 F.2d 648 (9th Cir.), *cert. denied*, 109 S.Ct. 1164 (1988) (noting conflict among circuits but declining to adopt either position because evidence was sufficient to establish enterprise separate from racketeering activity).

⁸¹ 706 F.2d at 1333 n.24.

⁸² *Bank of America v. Touche Ross*, 782 F.2d 966 (11th Cir. 1986).

⁸³ *United States v. Computer Sciences Corporation*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982). *Accord* *Entre Computer Centers v. FMG of Kansas City, Inc.*, 819 F.2d 1279, 1287 (4th Cir. 1987).

⁸⁴ *Schreiber Distributing v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1398 (9th Cir. 1986); *Haroco, Inc. v. American National Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985) (per curiam). *Accord* *United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc.*, 837 F.2d 356, 364 & n.20 (9th Cir. 1988) (citing 1 K. Brickey §7:03 (1984 & Supp. 1987)); *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 529 (9th Cir. 1987); *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1361 (3rd Cir. 1987); *Garbade v.*

Great Divide Mining & Milling Corp., 831 F.2d 212, 213-14 (10th Cir. 1987). *See also* *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 31-311 (1st Cir. 1986) (endorsing this interpretation in dicta).

⁸⁵ *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1979) (coining the term "enterprise conspiracy").

⁸⁶ For the definitive discussion of Wharton's rule, see *Lannelli v. United States*, 420 U.S. 770 (1975). *See also* *Jeffers v. United States*, 432 U.S. 137 (1977).

⁸⁷ *See, e.g., United States v. Torres Lopez*, 851 F.2d 520, 525 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 1144 (1989); *United States v. Angiulo*, 847 F.2d 956, 964 (1st Cir.), *cert. denied*, 109 S.Ct. 138 and 109 S.Ct. 314 (1988); *United States v. Teitler*, 802 F.2d 606, 613 (2d Cir. 1986); *United States v. Tripp*, 782 F.2d 38, 41 (6th Cir.), *cert. denied*, 475 U.S. 1128 (1986); *United States v. Pepe*, 747 F.2d 632, 645 n.8 (11th Cir. 1984); *United States v. Carter*, 721 F.2d 1514, 1528 n.20 (11th Cir. 1984); *United States v. Coia*, 719 F.2d 1120, 1123-1124 (11th Cir. 1983), *cert. denied*, 466 U.S. 973 (1984).

⁸⁸ *See, e.g., United States v. Schell*, 775 F.2d 559, 568 (4th Cir. 1985); *United States v. Boldin*, 772 F.2d 719, 727 (11th Cir. 1985), *on reh'ing*, 779 F.2d 618 (1986); *United States v. Kimble*, 719 F.2d 1253, 1256 (5th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984). *See also* *United States v. Palmeri*, 630 F.2d 192, 200 (3d Cir. 1980), *cert. denied*, 450 U.S. 967 and 450 U.S. 983 (1981).

⁸⁹ *See* 18 U.S.C. § 371.

⁹⁰ *See, e.g., 21 U.S.C. §§ 846, 963.*

⁹¹ *See, e.g., United States v. Ramos*, 666 F.2d 469, 475 (11th Cir. 1982) (construing 21 U.S.C. § 846); *United States v. Bates*, 600 F.2d 505, 510 (5th Cir. 1979) (construing 21 U.S.C. § 963).

⁹² *Morissette v. United States*, 342 U.S. 246 (1952).

⁹³ *See, e.g., United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983) ("a RICO conspiracy count must charge as a minimum that each defendant agreed to commit two or more specified predicate crimes in addition to charging an agreement to participate in the conduct of an 'enterprise's' affairs through a 'pattern of racketeering activity'"); *United States v. Teitler*, 802 F.2d 606, 613 (2d Cir. 1986) (defendant must agree to commit two predicate acts);

United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984) ("[p]revailing case law requires that for the government to convict on a RICO conspiracy it must prove that defendant himself at least agreed to commit two or more predicate crimes") (citing, *inter alia*, *United States v. Brooklier*, 685 F.2d 1208 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983)); *United States v. Cauble*, 706 F.2d 1322, 1341 n.64 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) ("The agreement involved must include the vital element of agreeing to commit the predicate acts of racketeering.").

⁹⁴ *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.), *cert. denied*, 474 U.S. 906 and 474 U.S. 971 (1985) (defendant must agree to commission of predicate acts of racketeering, not to personally commit those acts, to be guilty of RICO conspiracy). *Cf. United States v. Zaubert*, 857 F.2d 137, 148 (3rd Cir. 1988); *United States v. Joseph*, 781 F.2d 549, 554 (6th Cir. 1986) (defendant only needs to agree that another person will violate § 1962 by committing two acts of racketeering activity); *United States v. Muskovsky*, 863 F.2d 1319, 1324 (7th Cir.), *cert. denied*, 109 S.Ct. 1345 (1988); *United States v. Neapolitan*, 791 F.2d 489, 498 (7th Cir.), *cert. denied*, 479 U.S. 939 and 479 U.S. 940 (1986); *United States v. Leisure*, 844 F.2d, 1347, 1367 (8th Cir.), *cert. denied*, 109 S.Ct. 324 and 109 S.Ct. 403 (1988).

⁹⁵ *United States v. Rabinowich*, 238 U.S. 78, 84, 87 (1915). *Cf. United States v. Parker*, 469 F.2d 884, 895-96 (10th Cir. 1972) (defendants hired others to commit object offense).

⁹⁶ *Adams v. United States*, 474 U.S. 906 (1985) (White, J., dissenting from Court's denial of certiorari in case in which defendant was denied requested instruction that RICO conspiracy requires proof that defendant had personally agreed to commit two acts of racketeering activity and in which Third Circuit held that defendant need only agree to the commission of two acts of racketeering).

⁹⁷ 473 U.S. 479 (1985).

⁹⁸ *Id.* at 497.

⁹⁹ *Id.*

¹⁰⁰ *Id.* n.15.

¹⁰¹ *Id.*

¹⁰² *National Enterprises, Inc. v. Mellon Financial Services*, 847 F.2d 251 (5th Cir. 1988).

¹⁰⁹ Alexander Grant v. Tiffany Industries, Inc., 742 F.2d 408 (8th Cir. 1984), vacated and remanded for reconsideration in light of Sedima, 105 S.Ct. 3550 and 105 S.Ct. 3551 (1985), on remand, 770 F.2d 717 (1985).

¹⁰⁴ Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), rev'd, 473 U.S. 479 (1985).

¹⁰⁵ 473 U.S. at 488-89.

¹⁰⁶ Sparling v. Hoffman Construction Co., Inc., 864 F.2d 635, 640-41 (9th Cir. 1988); Adams-Lundy v. Ass'n of Professional Flight Attendants, 844 F.2d 245, 250 (5th Cir. 1988); Warner v. Alexander Grant & Co., 828 F.2d 1528, 1530 (11th Cir. 1987); Roeder v. Alpha Industries, Inc., 814 F.2d 22, 29 (1st Cir. 1987); Warren v. Manufacturers Nat'l Bank, 759 F.2d 542, 544 (6th Cir. 1985).

¹⁰⁷ Illinois Dept. of Revenue v. Phillips, 771 F.2d 312, 315-16 (7th Cir. 1985); County of Oakland v. City of Detroit, 866 F.2d 839, 847 (6th Cir. 1989).

¹⁰⁸ People v. Seneci, 817 F.2d 1015, 1017 (2d Cir. 1987); People v. Life of Mid-America Ins., 805 F.2d 763, 766-67 (7th Cir. 1986).

¹⁰⁹ See Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 378 (1985).

¹¹⁰ Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), rev'd, 473 U.S. 479 (1985).

¹¹¹ 473 U.S. at 491.

¹¹² Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1303 (7th Cir. 1987); Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 531 (9th Cir. 1987); United States v. Local 560, 780 F.2d 267 (3d Cir. 1985).

¹¹³ Benjamin v. Traffic Executive Ass'n E. R.R., 869 F.2d 107, 114 (2d Cir. 1989); In the Matter of Lewisville Properties, Inc., 849 F.2d 946, 949 (5th Cir. 1988); J.M. Muniz, Inc. v. Mercantile Texas Credit Corp., 833 F.2d 541, 544 (5th Cir. 1987); County of Cook v. Midcon Corp., 773 F.2d 892, 898, 905 n.4 (7th Cir. 1985).

¹¹⁴ Appley v. West, 832 F.2d 1021, 1026 (7th Cir. 1987). See also In the Matter of Lewisville Properties, Inc., 849 F.2d 946, 949 (5th Cir. 1988).

¹¹⁵ 18 U.S.C. § 1964(e).

Although § 1964 grants federal district courts jurisdiction to employ a variety of equitable remedies, it is doubtful that those remedies are available to private RICO plaintiffs. See, Religious Technology Cen-

ter v. Wollersheim, 796 F.2d 1076, 1088 (9th Cir. 1986); In re Fredeman Litigation, 843 F.2d 821, 824, 828-30 (5th Cir. 1988) (both holding that RICO does not authorize injunctive relief for private RICO litigants). Cf. Trane Co. v. O'Connor Securities, 718 F.2d 26, 28-29 (2d Cir. 1983); Dan River, Inc. v. Icahn, 701 F.2d 279, 290 (4th Cir. 1983); Bennett v. Berg, 685 F.2d 1053, 1064 (8th Cir. 1982), on reh'g, 710 F.2d 1361 (1983), cert. denied, 464 U.S. 1008 (1983) (all questioning, without deciding, whether RICO authorizes injunctive relief).

¹¹⁶ Id.

¹¹⁷ Aetna Casualty & Surety Co. v. Leibowitz, 730 F.2d 905, 907 (2d Cir. 1984).

¹¹⁸ 15 U.S.C. § 15.

¹¹⁹ 858 F.2d 1104 (5th Cir. 1988).

¹²⁰ Id. at 1142. Cf. Northeast Women's Center, Inc. v. McMonagle, RICO Business Disputes Guide ¶ 7010 (E.D. Pa. 1988) (Memorandum and Order) (attorney's fee awards need not be proportionate; successful RICO plaintiff may recover reasonable attorney's fees and costs even though such fees and costs amounted to eighty times the actual RICO damages prior to trebling.)

¹²¹ See, e.g., Gordon v. Heimann, 715 F.2d 531, 539 (11th Cir. 1983) (reversing district court's denial of motions to assess against plaintiff and plaintiffs' lawyers, attorneys' fees incurred by 44 civil RICO defendants represented by 11 different lawyers).

¹²² See, e.g., Flip Side Productions, Inc. v. Jam Productions, Ltd., 843 F.2d 1024, 1037 (7th Cir. 1988); Spiegel v. Continental Illinois Nat'l Bank, 790 F.2d 638, 650-51 (7th Cir. 1986).

¹²³ See, e.g., Chapman & Cole v. Ite Container Int'l B.V., 865 F.2d 676, 683-86 (5th Cir. 1989); Callahan v. Schoppe, 864 F.2d 44, 45-46 (5th Cir. 1989); Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1476 (9th Cir. 1988); Fahrrenz v. Meadow Farm Partnership, 850 F.2d 207, 210 (4th Cir. 1988); Fred A. Smith Lumber Co. v. Edidin, 845 F.2d 750, 752-54 (7th Cir. 1988); Flip Side Productions, Inc. v. Jam Productions, Ltd., 843 F.2d 1024, 1036 (7th Cir. 1988); Wardwell v. Metmor Financial, Inc., RICO Business Disputes Guide ¶ 7139 (D. Mass. Nov. 3, 1988) (Memorandum and Order); National Enterprises, Inc. v. Mellon Financial Services, 847 F.2d 251, 254 (5th Cir. 1988); Gordon v. Heimann, 715 F.2d 531, 539 (11th Cir. 1983).

¹²⁴ Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1105 (2d Cir. 1988) (creditor injured by bankruptcy fraud of debtor's officers has standing to sue officers, notwithstanding that bankrupt may have suffered an identical injury for which it has a similar right of recovery); Beneficial Standard Life Ins. Co. v. Madariagoa, 851 F.2d 271, 275 (9th Cir. 1988) (RICO cause of action accrues when plaintiff has actual or constructive knowledge of alleged fraud; plaintiff is deemed to have constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the fraud); Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985); Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984). But cf. Keystone Insurance Co. v. Houghton, 863 F.2d 1125, 1130, 1132-33 (3d Cir. 1988) (statute of limitations begins to run when plaintiff knew or should have known of existence of each element of a cause of action, but if injury or predicate act occurs as part of same pattern after plaintiff had or should have had such knowledge, then period of limitation begins when plaintiff knew or should have known of last injury or last predicate act; RICO cause of action does not accrue until last predicate act occurs).

¹²⁵ Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985); Compton v. Ide, 732 F.2d 1429, 1433. But cf. A.B. Alexander v. Perkin Elmer Corp., 729 F.2d 576, 577 (8th Cir. 1984) (applying state statute of limitations as construed by state court, which happens to correspond with federal rule governing accrual of cause of action).

¹²⁶ See, e.g., Durante Bros. v. Flushing Nat'l Bank, 755 F.2d 239, 248-49 (2d Cir.), cert. denied, 105 S.Ct. 3530 (1985) (applying statute governing actions to enforce liability created by statute in civil RICO action predicated on allegations of collection of unlawful debt and mail fraud); A.B. Alexander v. Perkin Elmer Corp., 729 F.2d 576, 577 (8th Cir. 1984) (holding RICO action was barred by state statute of limitations most appropriate under facts of case); Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984) (applying statute governing causes of action based on statute); Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985) (applying statute governing actions for fraud in civil RICO action based on mail and wire fraud).

¹²⁷ Malley-Duff & Assoc. v. Crown Life Ins. Co., 792 F.2d 341, 349 (3d Cir. 1986) (and concluding that a 6-year Pennsylvania "catchall" statute of limitations governs RICO actions), cert. granted, 479 U.S. 983 (1987); Tellis v. United States Fidelity & Guar. Co., 805 F.2d 741, 744 (7th Cir. 1986) (and concluding that RICO is best characterized as an action for treble damages subject to the two-year Illinois limitations statute).

¹²⁸ Agency Holding Corp. v. Malley-Duff & Associates, 483 U.S. 143 (1987).

¹²⁹ Compare McCarter v. Mitcham, 883 F.2d 196, 201 (3d Cir. 1989) (recognizing concurrent state and federal jurisdiction) and Brandenburg v. Seidel, 859 F.2d 1179, 1193-1195 (4th Cir. 1988) (same) and Lou v. Belzberg, 834 F.2d 730, 738-739 (9th Cir. 1987) (same), cert. denied, 485 U.S. 993 (1988) and Simpson Elec. Corp. v. Leucadia, Inc., 72 N.Y.2d 450, 530 N.E.2d 860 (1988) (same) and Rice v. Janovich, 109 Wash.2d 48, 742 P.2d 1230 (1987) (same) and Cianci v. Superior Court, 40 Cal.3d 903, 710 P.2d 375 (1985) (same) and County of Cook v. Midcon Corp., 773 F.2d 892, 905, n.4 (7th Cir. 1985) (dictum) and Dubroff v. Dubroff, 833 F.2d 557, 562 (5th Cir. 1987) (civil RICO claims can "probably" be brought in state court), with Chivas Products, Ltd. v. Owen, 864 F.2d 1280, 1286 (6th Cir. 1988) (holding federal courts exclusive jurisdiction) and VanderWeyst v. First State Bank of Benson, 425 N.W.2d 803, 812 (Minn.) (expressing "serious reservations" about assuming concurrent RICO jurisdiction), cert. denied, 109 S.Ct. 369 (1988).

¹³⁰ 110 S.Ct. 792 (1990).

¹³¹ Id. at 4158 (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981)).

¹³² 9 U.S.C. § 2.

¹³³ 9 U.S.C. § 3.

¹³⁴ 107 S.Ct. 2332 (1987).

¹³⁵ If all bids are at that level, the state may simply reject them all and start the bidding process anew. Joyner, *Bid Rigging by Highway Contractors and the Resulting Dispute Over Recovered Overcharges: The United States v. The States*, 23 AM. BUS. L.J. 417, 419-24 (1985); Strafer, "Operation Roadrunner: The Misapplication of Federal Criminal Sanctions to Bidrigging in the Highway Construction Industry," 11 AM. J. CRIM. L. 1 (1983).

At one time it was common for states to make the engineer's estimate, the overbid

price and other pricing information available to contractors. But that practice was later determined to be an invitation to collusion, and many states have since discontinued the practice. Joyner, *supra* at 421.

¹³⁰ The time to respond with a bid is generally three weeks. 23 C.F.R. § 635.107(c).

¹³¹ Flax, "The Crackdown on Colluding Roadbuilders," *Fortune* p. 79 (Oct. 3, 1983).

¹³² *Id.* at 80.

¹³³ *Id.*

¹³⁴ Firms that are not in the rotation may be induced to submit complementary bids by bribes and payoffs. In some instances, firms have remained profitable solely because of payoffs received for complementary bids. *Id.* at 88.

¹³⁵ Joyner, *supra* n. 135, at 421.

¹³⁶ *Id.* at 428; Flax, *supra* n. 137, at 80.

¹³⁷ 652 F.2d 290 (2d Cir. 1981).

¹³⁸ Bockrath, Dunham and Young's *Contracts, Specifications, and Law for Engineering* 153 (4th ed. 1986).

¹³⁹ Flax, *supra* n. 137, at 80.

¹⁴⁰ United States v. Young Bros., Inc., 728 F.2d 682 (5th Cir. 1984).

¹⁴¹ Flax, *supra* n. 137, at 80.

¹⁴² United States v. Lyons, 670 F.2d 77, 79 (7th Cir. 1982).

¹⁴³ See, e.g., KAN. STAT. ANN. § 13-1017.

¹⁴⁴ Compare *Curtis Ambulance of Florida, Inc. v. Board of County Commissioners*, 811 F.2d 1371 (10th Cir. 1987) (upholding dismissal of suit by lowest bidder because bidder had no property interest in contract before its award) with *Gilbert Central Corp. v. Kemp*, 637 F. Supp. 843 (D. Kan. 1986) (assuming, without deciding, that under Kansas statute lowest bidder has property interest in contract before its award) and *Andersen-Myers Co. v. Roach*, 660 F. Supp. 106 (D. Kan. 1987) (following *Kemp*) and *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118 (W.D. Penn. 1980) (when state statute requires bid to go to lowest responsible bidder, lowest responsible bidder in compliance with specifications has property right in the contract) and *Hixon v. Durbin*, 560 F. Supp. 654 (W.D. Penn. 1983) (same).

¹⁴⁵ 41 U.S.C. § 5.

¹⁴⁶ 23 U.S.C. §§ 101-157.

¹⁴⁷ 23 U.S.C. § 112(b).

¹⁴⁸ 23 C.F.R. § 630.114(h) (1989).

¹⁴⁹ 23 U.S.C. § 118(b)(4).

¹⁵⁰ The False Claims Act, 31 U.S.C. § 231 et seq., provides the United States a cause of action against any person who submits to a government agent or employee a fraudulent claim for payment. The Act provides a civil penalty of up to \$10,000, treble damages, and costs of suit. The False Claims Act expressly grants the United States a cause of action for damages.

¹⁵¹ United States v. Cohn, 270 U.S. 339 (1926).

¹⁵² United States ex rel Marcus v. Hess, 317 U.S. 537 (1943).

¹⁵³ 647 F.2d 757 (7th Cir. 1981).

¹⁵⁴ *Id.* at 761.

¹⁵⁵ *Id.*

¹⁵⁶ Although it is clear that RICO provides the United States with considerable civil enforcement powers, discussed *infra* at text accompanying notes 177-179, it is not clear that RICO provides the United States with a civil cause of action for damages. The key question, of course, is whether the United States is a "person injured in his business or property."

In *United States v. Cooper Corporation*, 312 U.S. 600 (1941), the Supreme Court held that the federal government was not a person injured in his business or property for purposes of the Sherman Act. The Court reasoned that the term "person" does not customarily include the sovereign; that no legislative intent to provide the government a treble damages action could be found; and that the Act distinguished between actions initiated by the government to vindicate public rights and actions by private parties to recover damages. Fourteen years later, Congress amended the Clayton Act to authorize the government to initiate civil causes of action for actual damages. 15 U.S.C. § 15a.

Although the reasoning in *Cooper* is persuasive, RICO poses some additional conundrums. First, RICO defines the term "person" to include "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). Governmental entities are clearly capable of owning property, and courts have permitted state and local governments to pursue civil actions under § 1964 without so much as stumbling on this question. The issues in the RICO cases relate, instead, to whether the plaintiff government has alleged the requisite injury.

Second, the structure of § 1964 is problematic. Section 1964(1) gives the district courts jurisdiction to prevent and restrain RICO violations. Section 1964(2) authorizes the Attorney General to institute proceedings under this section. Section 1964(3), which is part of "this section," provides "any person" injured in business or property a treble damages action.

Because the remainder of § 1964(2) relates to prompt hearings and preliminary restraining orders, subsection (2) is more closely linked to subsection (1) than to subsection (3). But because subsection (3) was added at the twelfth hour and without the benefit of any legislative history, Congress left us with yet another curious ambiguity to resolve.

The Justice Department has adopted the position that the federal government is a person with standing to bring a treble damages action, see U.S. Department of Justice, *Civil RICO: A Manual for Federal Prosecutors* 63 (Feb. 1988), and at least one court has agreed. *United States v. Barnette*, No. 85-745-Civ.-J-16 (M.D. Fla. Sept. 5, 1985).

¹⁵⁷ 567 F. Supp. 704 (M.D. Tenn. 1983).

¹⁵⁸ *Id.* at 707.

¹⁵⁹ *Id.* at 708-10.

¹⁶⁰ *Id.* at 709.

¹⁶¹ 479 F.2d 1099 (8th Cir. 1973).

¹⁶² *Tennessee v. Dole*, 749 F.2d 331 (6th Cir. 1984), cert. denied, 472 U.S. 1018 (1985).

¹⁶³ *Id.* at 336.

¹⁶⁴ *Id.* at 337.

¹⁶⁵ There are two distinct possibilities here. On the one hand, the state's use of the federal share of the recovered excess payment for current projects could result in the expenditure of more federal funds than was authorized by Congress. On the other hand, the state's use of the funds could be well within the congressional limit, but exceed the amount approved by the Secretary. By the early 1980's, for example, the Secretary had imposed a "deficit-fighting ceiling" on state expenditures that was less than the full amount Congress had authorized. Thus, in 1982, the administrative ceiling limited Tennessee to \$144 million, some \$27 million less than Congress authorized for the state. *Dole*, 749 F.2d at 333.

¹⁶⁶ The Tennessee legislature allocated almost \$5 million of the recovered highway funds the state's general fund. Although

the court disapproved of the diversion, the government did not base its recoupment claim on the unauthorized uses to which the funds had been put and would, in any event, have been estopped to do so, in the district court's view. *Dole*, 567 F. Supp. at 718-19.

¹⁶⁷ 23 U.S.C. § 126.

¹⁶⁸ The state disputed this contention. *Dole*, 749 F.2d at 333.

¹⁶⁹ *Id.*

¹⁷⁰ SIEGFRIED, INTRODUCTION TO CONSTRUCTION LAW, 28-29.

¹⁷¹ 18 U.S.C. § 1963(1).

¹⁷² 18 U.S.C. § 1968.

¹⁷³ A grand jury investigation may not be undertaken when the government's sole object is the initiation of civil proceedings. *United States v. Procter & Gamble*, 356 U.S. 677 (1958).

¹⁷⁴ Pub. L. No. 101-73, 103 Stat. 183, § 968 (Aug. 9, 1989).

APPENDIX A
Table of State RICO Laws

JURISDICTION	ENTERPRISE	RACKETEERING ACTIVITY		PATTERN	§ 1962 ANALOG	CIVIL ACTION	
		STATE	EXTRATERRITORIAL			STATE	PRIVATE*
<i>Arizona</i> ARIZ. REV. STAT. ANN. §§ 13-2301 through 13-2316	■ Optional.	■ Any crime for financial gain including bribery, scheme, or artifice to defraud, restraint of trade.	■ Equivalent crimes committed in another state.	X	■ Excludes § 1962(d) conspiracy analog.	■	■ Proof by preponderance of evidence.
<i>California</i> CAL. PENAL CODE §§ 186-186.8	X	■ Includes any act for financial gain chargeable as bribery, conspiracy to bribe.	X	■	X	X	X
<i>Colorado</i> COLO. REV. STAT. §§ 18-17-101 through 18-17-109	■ Includes licit & illicit; government entities.	■ Includes bribery, gratuity, and related offenses.	■ Incorporates federal predicate crimes under 18 U.S.C. § 1961(1).	■	■	■	■ Injunctive relief also authorized. Proof by preponderance of evidence.
<i>Connecticut</i> CONN. GEN. STAT. §§ 53-393 through 53-403	■ Includes licit & illicit; government entities.	■ Includes bribery and related offenses; hazardous waste violations.	X	■ Crimes occurring within 5 years of one another.	■ Excludes § 1962(d) conspiracy analog.	X	X
<i>Delaware</i> DEL. CODE ANN. tit. 11, §§ 1501-1511	■ Includes licit & illicit; government entities.	■ Includes bribery, misuse of office, and improper influence.	■ Incorporates federal predicate crimes under 18 U.S.C. § 1961(1).	■ Not required for civil action.	■	■ Damages, forfeiture, and civil penalty of up to \$100,000 for each violation.	■ Trebble damages, costs; punitive damages when appropriate.
<i>Florida</i> FLA. STAT. §§ 895.01-895.08)	■ Includes licit & illicit; government entities.	■ Includes bribery, misuse of office.	■ Incorporates federal predicate crimes under 18 U.S.C. § 1961.	■ Crimes occurring within 5 years of one another.	■	■ Trebble damages, costs, att'y fees. Proof by clear & convincing evidence.	■ Any injury compensable. Trebble damages [\$200 minimum], costs & att'y fees; equitable relief. Proof by clear & convincing evidence.
<i>Georgia</i> GA. CODE ANN. §§ 16-14-1 through 16-14-15)	■ Includes licit & illicit; government entities.	■ Includes bribery.	■ Incorporates federal predicate crimes under 18 U.S.C. § 1961(1); includes equivalent crimes committed in other states.	■ Crimes occurring within 4 years of one another.	■ Excludes § 1962(a) investment analog.	■	■ Any injury compensable. Trebble damages, costs & att'y fees; punitive damages when appropriate; equitable relief.
<i>Hawaii</i> HAW. REV. STAT. §§ 842-1 through 842-12	■	■ Includes bribery.	X	X	■ Excludes § 1962(d) conspiracy analog; excludes pattern requirement.	■	■ Actual damages, costs & att'y fees.

JURISDICTION	ENTERPRISE	RACKETEERING ACTIVITY		PATTERN	§ 1962 ANALOG	CIVIL ACTION	
		STATE	EXTRATERRITORIAL			STATE	PRIVATE*
<i>Idaho</i> IDAHO CODE §§ 18-7801 through 18-7805	■ Includes licit & illicit.	■ Includes fraud, bribery, and corrupt influence.	■ Equivalent crimes committed in other jurisdictions.	■ Crimes occurring within 5 years of one another.	■	■	■ Any injury compensable.
<i>Indiana</i> IND. CODE §§ 35-45-6-1 through 35-45-6-2; §§ 34-4-30.5-1 through 34-4-30.5-6	■ Includes government entities.	■ Includes official misconduct.	X	■ Crimes occurring within 5 years of one another.	■ Excludes § 1962(d) conspiracy analog.	■	■ Treble damages, costs & att'y fees; punitive damages when appropriate.
<i>Minnesota</i> MINN. STAT. §§ 609.901-609.912	■ Includes licit.	■	X	■ Requires 3 or more acts.	■ Excludes § 1962(d) conspiracy analog.	■ Civil penalty of up to \$1 million, costs & att'y fees).	X
<i>Mississippi</i> MISS. CODE ANN. §§ 97-43-1 through 97-43-11	■ Includes licit & illicit; government entities.	■ Includes fraud in connection with state or federally funded assistance programs.	X	■ Crimes occurring within 5 years of one another.	■	■	■ Any injury compensable; treble damages, costs & att'y fees; punitive damages when appropriate; equitable relief. Prior criminal conviction required.
<i>Nevada</i> NEV. REV. STAT. §§ 207.350 through 207.520	■ Includes licit & illicit; government entities.	■ Includes bribery.	X	■ Crimes occurring within 5 years of one another.	■	X	■
<i>New Jersey</i> N.J. REV. STAT. §§ 2C:41-1 through 2C:41-6	■ Includes licit & illicit; government entity.	■ Includes bribery.	■ Incorporates federal predicate crimes under 18 U.S.C. § 1961(1)(b),(d); includes equivalent crimes committed in any jurisdiction.	■	■	■	■
<i>New Mexico</i> N.M. STAT. ANN. §§ 30-42-1 through 30-42-6	■ Includes licit & illicit.	■ Includes bribery, illegal kickbacks.	X	■ Crimes occurring within 5 years of one another.	■	■	■
<i>New York</i> N.Y. PENAL L. §§ 460.00-460.80	■	■ Includes false statements, bribery, schemes to defraud, environmental and hazardous-substance crimes.	X	■ Requires 3 acts.	■ Excludes § 1962(d) conspiracy analog.	■ Prior criminal conviction required.	X
<i>North Carolina</i> N.C. GEN. STAT. §§ 75D-1 through 75D-4	■ Includes licit & illicit; government entities.	■ Includes bribery.	■ Incorporates federal predicate crimes under 18 U.S.C. § 1961(1).	■ Crimes occurring within 4 years of one another.	■ Excludes § 1962(a) investment analog.	X	■ Pattern must not consist solely of mail, wire and securities fraud.

JURISDICTION	RACKETEERING ACTIVITY				§ 1962 ANALOG	CIVIL ACTION	
	ENTERPRISE	STATE	EXTRATERRITORIAL	PATTERN		STATE	PRIVATE*
<i>North Dakota</i> N.D. CENT. CODE §§ 12.1-06.1-01 through 12.-1- 06.1-08	■ Excludes individ- ual.	■ Act committed for financial gain, in- cluding bribery, fraud, false claims.	■ Equivalent crimes committed in another state.	■	■ Excludes § 1962(d) conspiracy analog.	■	■ Any injury compensable.
<i>Ohio</i> OHIO REV. CODE ANN. §§ 2931.31- 2931.36	■ Includes licit & il- licit; government agency.	■ Includes bribery.	■ Incorporates federal predicate crimes un- der 18 U.S.C. § 1961(1).	■ Crimes oc- curring within 6 years of one an- other.	■ Excludes § 1962(d) conspiracy analog.	■	■ Any injury or threatened in- jury compens- able. Equitable re- lief also au- thorized. Proof by clear & convincing evidence. Pattern must not consist solely of mail, wire, and se- curities fraud.
<i>Oklahoma</i> OKLA. STAT. ANN. tit. 22 §§ 1401-1419	■ Includes licit & il- licit; government entities.	■ Includes official misconduct, fraud.	X	■ Crimes oc- curring within 3 years of one an- other.	■	■ Civil pen- alty not to exceed \$100,000.	X
<i>Oregon</i> OR. REV. STAT. §§ 166.715- 166.735)	■ Includes licit & il- licit; government entities.	■ Includes bribery, abuse of public of- fice, business & commercial offen- ses.	■ Incorporates federal predicate crimes un- der 18 U.S.C. § 1961(1).	■ Crimes oc- curring within 5 years of one an- other.	■	■ Att'y fees & costs re- coverable. Investiga- tive agency may recover civil penal- ties not to exceed \$250,000.	■ Any injury compensable. Punitive dam- ages also au- thorized.
<i>Pennsylvania</i> 18 PA. CONS. STAT. § 911	■	■ Includes bribery & corrupt influence.	X	■	■	X	X
<i>Rhode Island</i> R.I. GEN. LAWS §§ 7-15-1 through 7-15-11	■	■ Includes bribery	X	X	■ Excludes § 1962(d) conspiracy analog and pattern re- quirement.	■	■
<i>Utah</i> UTAH CODE ANN. §§ 76-10-1601 through 76-10- 1608.	■ Includes licit & il- licit.	■ Includes bribery, official misconduct, false statements, procurement offen- ses.	■ Incorporates federal predicate crimes un- der § 1961(1).	■ Crimes oc- curring within 5 years of one an- other. Requires 3 acts.	■	■	■ Any injury compensable. Double dam- ages, costs & att'y fees; eq- uitable relief. Arbitration for fraud ac- tions.

JURISDICTION	ENTERPRISE	RACKETEERING ACTIVITY		PATTERN	§ 1962 ANALOG	CIVIL ACTION	
		STATE	EXTRATERRITORIAL			STATE	PRIVATE*
<i>Washington</i> WASH. REV. CODE §§ 9A.82.1011- 9A.82.120, § 9A.82.904	■ Includes licit & il- licit; government entities.	■ Includes bribery.	■ Equivalent crimes committed in another state.	■ Crimes oc- curring within 5 years of one an- other. Requires 3 acts.	■ Excludes § 1962(c) conduct analog.	■ Civil pen- alty not to exceed \$250,000 or damages on behalf of injured party; costs; & att'y fees.	■ Actual dam- ages, costs & att'y fees; dis- cretionary tre- ble damages.
<i>Wisconsin</i> WIS. STAT. ANN. §§ 946.80-946.87	■ Includes licit & il- licit; government entities.	■ Includes bribery.	■ Incorporates federal predicate crimes un- der § 1961(1).	■ Crimes oc- curring within 7 years of one an- other. Requires 3 acts.	■ Excludes § 1962(d) conspiracy analog.	■	■ Any injury compensable. Double dam- ages, costs & att'y fees; pu- nitive dam- ages also authorized.

* Unless a different measure of damages is specified, ■ denotes treble damages, costs and attorneys' fees. Denoted punitive damages are in addition to the basic statutory measure of damages.

APPLICATIONS

The foregoing research should be informative to highway administrators and others involved in the administration of contracts and highway operations,

and it will prove to be most helpful to the attorneys and investigators involved in investigating and prosecuting criminal activity.

NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM NCHRP Project Advisory Committee SP20-6

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Edward V. A. Kussy
FHWA Liaison Representative
Crawford F. Jencks
NCHRP Staff

^a Formerly with Texas Office of the Attorney General
^b Formerly with Federal Highway Administration
^c Formerly with California Department of Transportation
^d Formerly with Colorado Department of Highways